

Police Shootings Of Black Men and Implicit Racial Bias: Can't We All Just Get Along

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I. INTRODUCTION

I am an invisible man. No, I am not a spook like those who haunted Edgar Allen Poe; nor am I one of your Hollywood movie ectoplasms. I am a man of substance, of flesh and bone, fiber and liquids—and I might even be said to possess a mind. I am invisible, understand, simply because people refuse to see me. Like the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard, distorting glass. When they approach me they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me.¹

– Ralph Ellison, *Invisible Man*

In 2013, the nation witnessed the trial and acquittal of George Zimmerman, who shot and killed an unarmed Black teenager named Trayvon Martin.² Then in 2014, there was extensive media coverage of

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From 1989 to 2007 Lawson litigated numerous murder, civil rights, and police misconduct cases in both federal and state courts and had an active appellate practice. His high-profile clientele included NFL star Elbert "Ickey" Woods, NFL star and professional baseball player Deion Sanders, and entertainer Peter Frampton. Lawson also represented many "everyday" people, including a single mother whose sixteen-year-old juvenile son, incarcerated in an Ohio prison for adults, had died after being stabbed sixteen times by the leader of a racist hate group, the Aryan Nation. Approximately one fourth of Ken's cases were done *pro bono*.

Since moving to Hawai'i with his family in 2008, Ken has made hundreds of presentations, including the judiciary's juvenile drug court program, training programs for prosecutors, the government lawyers section of the bar, the Hawai'i Supreme Court's mandatory professionalism program, the Hawaii State Bar Association annual convention, disciplinary board of the Hawai'i Supreme Court, local law firms of all sizes, and numerous community groups. Ken was selected by the Law School's Class of 2014 to deliver the graduation address.

¹ RALPH ELLISON, *INVISIBLE MAN* 3 (Vintage Books, 2nd ed. 1995).

² Greg Botelho & Holly Yan, *George Zimmerman Found Not Guilty in Trayvon*

police killings of unarmed Black men and boys, including Eric Garner, Michael Brown, John Crawford, Tamir Rice, and Levar Jones.³ Eric Garner's arrest and death was caught on video by a bystander, allowing the country to watch a team of police officers take down Garner and to hear his last words: "I can't breathe."⁴

Michael Brown, an unarmed Black teenager, was shot by a police officer in Ferguson, Missouri following a confrontation that was the subject of conflicting accounts. Several of the eyewitnesses to the shooting said Brown was holding his hands in the air, trying to surrender, when the officer fired the fatal shots into his body and head.⁵

John Crawford picked up an air gun from the shelves of a Wal-Mart and was standing alone in a store aisle, talking to someone on his cell phone, when he was shot and killed by police responding to a 911 call.⁶

Tamir Rice was a twelve-year-old Black boy who had been playing with a toy gun in a city park in Cleveland, Ohio. Responding to a 911 call, a city police officer shot and killed Rice within seconds of confronting him in the park. Initial reports indicated that when the police officer arrived on the scene, Rice pulled the toy gun out of his waistband and pointed it at the officer, but surveillance video later revealed that not to be the case.⁷

Levar Jones, a young, unarmed Black man, was shot by a South Carolina state trooper when, at the trooper's request, Jones reached into his SUV to retrieve his driver's license. The trooper claimed that Jones had behaved in a threatening way, but a video later contradicted the trooper's description.⁸

Martin's Death, CNN (July 14, 2013, 11:50 AM), http://www.cnn.com/2013/07/13/justice/zimmerman-trial/index.html?hpt=hp_t1.

³ Elizabeth Nolan Brown, *Families of Eric Garner, Michael Brown, Tamir Rice, and Other Recent Victims of Police Violence Gather for "Justice for All March" in D.C.*, REASON (Dec. 13, 2014, 8:30 PM), <http://reason.com/blog/2014/12/13/march-against-police-violence-dc>.

⁴ Nick Bryant, *Eric Garner Death: U.S. Orders Civil Rights Inquiry*, BBC NEWS (Dec. 4, 2014, 5:05 PM), <http://www.bbc.com/news/world-us-canada-30323750>.

⁵ *What Happened in Ferguson?*, N.Y. TIMES (Nov. 25, 2014), http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=1.

⁶ Treye Green, *John Crawford Shooting: Ohio Man Shot Dead by Police While Holding Toy Rifle in Walmart*, INT'L. BUS. TIMES (Aug. 11, 2014, 5:59 PM), <http://www.ibtimes.com/john-crawford-shooting-ohio-man-shot-dead-police-while-holding-toy-rifle-walmart-1655416>.

⁷ Tom McCarthy, *Tamir Rice: Video Shows Boy, 12, Shot "Seconds" After Police Confronted Child*, THE GUARDIAN (Nov. 26, 2014, 2:55 PM), <http://www.theguardian.com/us-news/2014/nov/26/tamir-rice-video-shows-boy-shot-police-cleveland>.

⁸ Tony Santaella & Steven Dial, *Trooper on Shooting: "He Kept Coming Towards Me"*, WLTX (Sept. 27, 2014, 1:55 AM), <http://www.wltx.com/story/news/local/2014/09/26/sean-groubert-gives-his-account-of-shooting-levar-jones/16295527/>.

Following each of these shootings, Black communities erupted in outrage and civil rights leaders from all over the country gathered. Across the country, from Los Angeles to New York, there were related protests of various kinds, some involving violence and looting.⁹ Meanwhile, police departments, police unions, business leaders, and some politicians expressed support for the police.¹⁰ The police and their supporters argued that race had nothing to do with the shootings.¹¹ They expressed sadness that lives had been lost, but contended that a suspect had threatened a police officer or resisted arrest in each of these cases.¹² Many of them tried to divert attention from the issue of police killing unarmed Black men and getting away with it, by suggesting that, instead of focusing on such isolated cases, the Black community should be doing something about disproportionately high violent-crime rates by young Black males.¹³ The suggestion that Blacks are doing nothing about crime by Blacks is unfair. Many Black communities have active programs aimed at decreasing such crime and violence, but these efforts are seldom covered by the mainstream media, and most Whites do not pay attention to Black media.¹⁴ Black communities acknowledged that none of the recent police shootings of unarmed Black males were random or premeditated, but that White suspects in similar circumstances would not have been shot.¹⁵

Race can be a sensitive topic, even under the best of circumstances. But at a time when White police officers are killing unarmed Black men and boys, it is difficult to discuss the role of race and other underlying issues

⁹ *Latest Updates: Protests Nationwide as More Troops are Called to Ferguson*, N.Y. TIMES (Nov. 25, 2014), <http://news.blogs.nytimes.com/2014/11/25/live-updates-grand-jury-decision-darren-wilson-ferguson>.

¹⁰ Mark Gillispie, *Police Supporters to Hold Rally in Cleveland*, OHIO.COM AKRON BEACON JOURNAL (Dec. 24, 2014, 8:52 PM), <http://www.ohio.com/news/break-news/police-supporters-to-hold-rally-in-cleveland-1.552813>; see also *Things Heat Up as Pro-Police Demonstrators Hold "All Lives Matter" Rally*, CBS LOS ANGELES (Dec. 26, 2014, 6:09 PM), <http://losangeles.cbslocal.com/2014/12/28/things-get-heated-as-pro-police-demonstrators-hold-all-lives-matter-rally/>.

¹¹ *FBI: No Evidence Zimmerman was Racist*, WND POLITICS (July 14, 2013, 10:46 PM), <http://www.wnd.com/2013/07/fbi-no-evidence-zimmerman-was-racist/>.

¹² See Bryant, *supra* note 4; see also *What Happened in Ferguson?*, *supra* note 5; McCarthy, *supra* note 7; Santaella & Dial, *supra* note 8.

¹³ John Perazzo, *Police Shooting & Race, in an Age of Lies*, FRONTPAGE MAG (Dec. 10, 2014), <http://www.frontpagemag.com/2014/john-perazzo/police-shootings-race-in-an-age-of-lies/>.

¹⁴ Tim Wise, *Crime, Race and the Politics of White Deflection* (July 22, 2013), <http://www.timwise.org/2013/07/crime-race-and-the-politics-of-white-deflection/>.

¹⁵ Jacaah Lee, *Exactly How Often Do Police Shoot Unarmed Black Men?*, MOTHER JONES (Aug. 15, 2014, 5:00 AM), <http://www.motherjones.com/politics/2014/08/police-shootings-michael-brown-ferguson-black-men>.

calmly, logically, and cohesively, regardless of the specific circumstances of each killing.¹⁶ (To the Black community in particular) The specific facts of each killing are not the primary issue.¹⁷ The primary problem is more complicated and nuanced than the individual police officer pulling the trigger in each case.¹⁸ Each of these officers needs to be held accountable for their actions, especially if they acted unreasonably under the circumstances, but there are larger issues that need to be faced. Professional athletes and others have attempted to make the point that Black lives matter in various ways by holding up their hands in mock surrender, as some witnesses claimed that Michael Brown was doing at the time of his shooting, and by wearing t-shirts inscribed with Eric Garner's last words: "I can't breathe."¹⁹

Demonstrators in New York were videotaped in December 2014 chanting, "What do we want? *Dead cops*. When do we want it? *Now!*"²⁰ Within days, two NYPD police officers were shot and killed by a Black man.²¹ Media coverage described the shooter as deranged,²² but that did not stop the head of the NYPD police union from blaming not just the anti-police protesters but also New York's Mayor, Bill de Blasio, for allegedly showing too much sympathy for the protestors and too little support for the police.²³ Fox News made matters worse when its Baltimore affiliate aired

¹⁶ See Jaclyn Kelley, *Black Males' Relationship with Police a Hot Topic Locally*, WWLTV (Dec. 3, 2014, 11:03 PM), <http://www.wwltv.com/story/news/local/orleans/2014/12/03/police-chief-talks-race-relations-at-suno/19874339/>.

¹⁷ See Bruce Drake, *Ferguson Highlights Deep Divisions Between Blacks and Whites in America*, PEW RESEARCH CENTER (Nov. 26, 2014), <http://www.pewresearch.org/fact-tank/2014/11/26/ferguson-highlights-deep-divisions-between-blacks-and-whites-in-america/>.

¹⁸ *Id.*

¹⁹ Ashahed M. Muhammad, *A New Era of Social and Political Consciousness for Black Athletes?*, THE FINAL CALL (Dec. 16, 2014, 8:47 PM), http://www.finalcall.com/artman/publish/National_News_2/article_102000.shtml.

²⁰ *Video Shows NYC Protesters Chanting For "Dead Cops"*, NBC N.Y. (Dec. 15, 2014, 8:56 AM), <http://www.nbcnewyork.com/news/local/Eric-Garner-Manhattan-Dead-Cops-Video-Millions-March-Protest-285805731.html> (emphasis added).

²¹ Joshua Berlinger et al., *2 NYPD Police Officers "Assassinated"; Shooter Dead*, CNN (Dec. 20, 2014, 11:43 PM), <http://www.cnn.com/2014/12/20/us/new-york-police-officers-shot/>.

²² Dick Polman, *A Deranged Thug, Not Obama, Killed Those New York Cops*, NEWS WORKS (Dec. 23, 2014), <http://www.newsworks.org/index.php/local/national-interest/76618-a-deranged-thug-not-obama-killed-those-new-york-cops>; see also *Cop Killer's Family: Ismaaiyl Brinsley Had Troubles, Didn't Get Help He Needed*, CBS N.Y. (Dec. 22, 2014, 11:07 PM), <http://newyork.cbslocal.com/2014/12/22/cop-killers-family-ismaaiyl-brinsley-had-troubles-didnt-get-help-he-needed/> (reporting that Brinsley's family described him as an angry, troubled man whose life had spiraled out of control).

²³ Andrew Hart, *NYC Police Union Chief Blames Mayor, Protesters for Police Killings*, THE HUFFINGTON POST (Dec. 21, 2014, 12:59 AM), <http://www.huffingtonpost.com/2014/>

an improperly edited video in which protestors appeared to be chanting, “Kill a cop.”²⁴ Fox’s national show “Fox and Friends” also aired the misleading video and tied the “kill a cop” chant to civil rights activist Al Sharpton.²⁵ The actual footage showed the protestors chanting, “We won’t stop! We can’t stop! Till killer cops are in cell blocks!”²⁶ In short, there was outrage and outrageous accusations on both sides of the national discussion, leaving many to wonder, “can we all get along?”²⁷

As this article is being written, there are two very different ongoing conversations regarding police-community relations. On one side are those who see race as a major factor—if not the sole factor—each time an unarmed Black man or boy is shot by law enforcement. This side acknowledges the existence of many “good” cops, but they view some in law enforcement as subject to explicit bias and racism against Blacks and the system as overly protective of “bad” cops.²⁸ This side tends to distrust law enforcement’s presentation of the “facts” when the alleged perpetrator is a Black male.²⁹

The other side of this national debate tends to believe that police often come down hard on Black males simply because Black males commit so many crimes. That is, they see both themselves and law enforcement across the country as being “colorblind,” and any race problem as directly and inexorably linked to criminal tendencies by Black males.³⁰

Each side tends to talk past the other rather than to the other, and neither is listening very well. The gap between the two sides is significant. For example, fifty-nine percent of White Americans have confidence in the police as an institution and do not view them as racist while most Blacks

12/20/new-york-police-union-mayor_n_6361046.html.

²⁴ Nick Wing, *Local News: Protesters Didn’t Actually Chant “Kill a Cop.” Sorry for the “Misunderstanding”*, THE HUFFINGTON POST (Dec. 24, 2014, 10:59 AM), http://www.huffingtonpost.com/2014/12/23/baltimore-news-kill-a-cop_n_6372468.html.

²⁵ *Id.*

²⁶ *Id.*

²⁷ This is a quote made famous by Rodney King, himself a victim of police brutality which will be discussed later in this paper. See Jesse Washington, *Rodney King Death: “Can We All Get Along?” Plea Measures His Lasting Meaning*, THE HUFFINGTON POST (Aug. 17, 2012, 5:12 AM), http://www.huffingtonpost.com/2012/06/17/rodney-king-death-can-we-all-get-along_n_1604450.html.

²⁸ See Kareem Abdul-Jabbar, *Kareem Abdul-Jabbar: The Police Aren’t Under Attack. Institutionalized Racism Is*, TIME (Dec. 21, 2014), <http://time.com/3643462/kareem-abdul-jabbar-nypd-shootings-police/>.

²⁹ See LZ Granderson, *Why Black People Don’t Trust the Police*, CNN (Mar. 23, 2012, 11:30 AM), <http://www.cnn.com/2012/03/22/opinion/granderson-florida-shootings/>.

³⁰ Jason L. Riley, *The Other Ferguson Tragedy*, WALL ST. J. (Nov. 25, 2014), <http://www.wsj.com/articles/jason-riley-the-other-ferguson-tragedy-1416961287>.

view police as racist with only thirty-seven percent of Black Americans having confidence in the police as an institution.³¹

Although there are undoubtedly some racist police officers,³² many police shootings of unarmed Black males are the result of implicit racial bias. For example, in finding that the Seattle Police Department engaged in an unconstitutional pattern and practice of discrimination against Blacks, the U.S. Department of Justice ("DOJ") noted that biased policing "is not primarily about the ill-intentioned officer but rather the officer who engages in discriminatory practices subconsciously."³³ Other police departments may be engaging in racially biased policing while still thinking of themselves as unbiased.³⁴

Implicit racial bias is at work in most police shootings of unarmed Black males, not only at the time of the initial encounter, but also through the investigation of the shooting and the entire judicial process that follows the investigation. Implicit bias can be found in good people of every racial background. The tendency for police officers to view their own actions in the best light possible, or to shade or stretch the truth to protect their personal interests, reflects the human condition.³⁵

This paper defines and explains implicit racial bias, demonstrates that implicit racial bias against Black males has been rooted in American culture since slavery, and then spotlights the role played by implicit racial bias in police shootings of unarmed and sometimes innocent Black males.

³¹ Frank Newport, *Gallup Review: Black and White Attitudes Toward Police*, GALLUP (Aug. 20, 2014), <http://www.gallup.com/poll/175088/gallup-review-black-white-attitudes-toward-police.aspx>.

³² See, e.g., Ben Tuft, *Five Ohio Police Officers Investigated for Sending Each Other Racist Text Messages*, THE INDEPENDENT (Dec. 7, 2014), <http://www.independent.co.uk/news/world/americas/five-ohio-police-officers-investigated-for-sending-each-other-racist-text-messages-9908922.html> (reporting that five Ohio police officers were recently investigated for sending racist text messages, such as "I hate niggers. That is all," and "What do apples and black people have in common? They both hang from trees").

³³ See U.S. DEPT. OF JUSTICE, INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT 34 (Dec. 16, 2011), available at http://www.justice.gov/crt/about/spl/documents/spd_findletter_12-16-11.pdf.

³⁴ *Id.*

³⁵ This has been demonstrated in cases where a video recording could be compared to the officer's account of the shooting—that is, the officer shoots a Black suspect, perhaps because of subjective fear (implicit racial bias), but then instead of telling the truth and admitting he may have shot the victim by mistake, he makes up a story to support his own actions. See, e.g., Frank Serpico, *Serpico: Incidents Like Eric Garner's Death Drive Wedge Between Police and Society*, N.Y. DAILY NEWS (Dec. 5, 2014, 10:30 AM), <http://www.nydailynews.com/new-york/serpico-wedge-driven-police-society-article-1.2034651>.

The last section of this article explores the unfortunate results of implicit racial bias in select cases and concludes with an analysis of the following three recommendations for reducing implicit bias shootings and increasing the chances of justice being served when a police officer shoots an unarmed Black male: (1) police training should include the nature and implications of implicit racial bias, (2) jurors and judges should be educated on implicit racial bias and shooter bias, and (3) police departments and their communities should sincerely engage in a collaborative effort to develop a meaningful Community Problem Oriented Policing (CPOP) program where police officers and community members become proactive partners in crime problem solving and community relations.

As New York City Police Commissioner William Bratton said so eloquently at slain NYPD Officer Ramos's funeral:

The police, the people who are angry at the police, the people who support us but want us to be better, even a madman who assassinated two men because all he could see was two uniforms, even though they were so much more. We don't see each other. If we can learn to see each other, to see that our cops are people like Officer Ramos and Officer Liu, to see that our communities are filled with people just like them, too. If we can learn to see each other, then when we see each other, we'll heal. We'll heal as a City. We'll heal as a country.³⁶

A. Nothing Changes if Nothing Changes

My personal journey in learning to be more open-minded regarding relations between law enforcement and the Black community took place in Cincinnati, where I was raised and practiced law for seventeen years. That relationship in 2001 may have foreshadowed the riots that occurred in places like Ferguson, Missouri in 2014.

There had been a series of police shootings of unarmed Black males in Cincinnati over a relatively short period of time, which culminated in four straight days of violent riots.³⁷ The events that set things off began on an unusually warm spring night on April 7, 2001,³⁸ when an off-duty police

³⁶ The Editorial Board, *Respect for NYPD Squandered in Attacks on Bill de Blasio*, N.Y. TIMES (Dec. 29, 2014), http://www.nytimes.com/2014/12/30/opinion/police-respect-squandered-in-attacks-on-de-blasio.html?_r=0.

³⁷ *Timeline of Roach-Thomas Case*, THE CINCINNATI ENQUIRER (Mar. 20, 2002), http://www.enquirer.com/editions/2002/03/20/loc_timeline_of.html.

³⁸ John Larson, *Behind the Death of Timothy Thomas*, DATELINE NBC (Apr. 10, 2004), http://www.nbcnews.com/id/4703574/ns/dateline_nbc-dateline_specials/t/behind-death-timothy-thomas/#.VKCxcw4DmA.

officer spotted Timothy Thomas, a nineteen-year-old Black male, walking in a downtown neighborhood.³⁹ As the officer approached, Thomas ran and Officer Stephen Roach took off after him.⁴⁰ Thomas was wanted on fourteen misdemeanor warrants, twelve of which were traffic violations—none involved violence.⁴¹ Officer Roach, running with his gun out, safety off, and finger on the trigger, shot Thomas when he saw Thomas running around the corner of the building.⁴² Roach fired his gun, fatally wounding Thomas.⁴³ Immediately after the shooting, Officer Roach told other officers that the gun “just went off.”⁴⁴ Later, after Roach met with his union attorney and union representative,⁴⁵ his story changed. Instead of saying that his gun “just went off,” he said that he thought he saw Thomas reaching into his pants, as if to draw a gun.⁴⁶ Three days later, already suspicious of Roach’s story, investigators got Roach to admit that he had shot Thomas because he had been startled.⁴⁷

Roach was indicted for negligent homicide.⁴⁸ His case was heard by a White judge, with no jury.⁴⁹ In finding Roach not guilty of negligently killing Thomas, the judge reasoned that “Timothy Thomas put police officer Roach in a situation where he believed he had to shoot Timothy Thomas or he would be shot by Timothy Thomas when Timothy Thomas did not show his hands as ordered.”⁵⁰ According to the judge, “this shooting was a split-second reaction to a very dangerous situation created by Timothy Thomas Officer Roach’s reaction was reasonable on his part, based upon the contact between himself and Timothy Thomas and the information he had at that time in that dark Cincinnati alley.”⁵¹

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Gregory Korte, *Police Inquiry Scorches Roach*, THE CINCINNATI ENQUIRER (Mar. 20, 2002), http://www.enquirer.com/editions/2002/03/20/loc_1police_inquiry.html.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Jane Prendergast, *Video Showed Officer Lied*, THE CINCINNATI ENQUIRER (Mar. 20, 2002), http://www.enquirer.com/editions/2002/03/20/loc_2video_showed_officer.html.

⁴⁵ *Id.*

⁴⁶ Larsen, *supra* note 38.

⁴⁷ Korte, *supra* note 41.

⁴⁸ *Id.*

⁴⁹ *Id.*; see also *Common Pleas Judge Ralph Winkler for Probate Court 2014*, <http://www.judgeralphwinkler.com/> (last visited Dec. 28, 2014) (describing the judge’s background).

⁵⁰ *Excerpts from Cincinnati Judge’s Statement in Court*, USA TODAY (Sept. 26, 2001), <http://usatoday30.usatoday.com/news/nation/2001/09/26/cinci-excerpts.htm> [hereinafter Cinn. Judge Stmt.].

⁵¹ *Id.*

The family of Timothy Thomas retained me as their lawyer. On their behalf, I filed a lawsuit and eventually combined that case with lawsuits that I had previously filed on behalf of other victims of police shootings into one federal class action lawsuit alleging racial profiling.⁵² The ACLU eventually joined this lawsuit.⁵³ Rather than pursue a routine § 1983 civil rights action, the lead plaintiffs entered into a collaborative process with specific stakeholders that included the police department, the police union, the Black community through a non-profit organization named the Cincinnati Black United Front, representatives of the city's White community, local churches and businesses, and the DOJ.⁵⁴ The parties used the information gathered from the stakeholders to reach the "Cincinnati Collaborative Agreement" ("the Collaborative").⁵⁵

Simply put, the Collaborative was the product of an alternative dispute resolution effort not just to resolve the lawsuit but also to mediate major ongoing social conflict between the police department and Black community in Cincinnati. Each participant in the Collaborative process had to agree to stop blaming others and work towards a solution that would serve the best interests of all the people of Cincinnati.⁵⁶ A Bloomberg News report in December of 2014 suggested that the Collaborative has withstood the test of time.⁵⁷ The Collaborative plays a major role in my assessment of recent clashes between law enforcement and Black communities and my recommendations for "getting along."

II. DEFINING IMPLICIT RACIAL BIAS

A. *Implicit Associations*

Underlying the theory of implicit bias are implicit associations. These are "the subconscious relationships our minds draw between nouns and

⁵² The original class action racial profiling lawsuit was *Bomani Tyehimba, et al. v. City of Cincinnati*, available at <http://city-egov.cincinnati-oh.gov/Webtop/ws/council/public/child/Blob/1263.pdf?jsessionid=DB5307CB2B05859C8BAE3FB699A079D8?m=1205>. The case was then renamed *In Re Cincinnati Policing*, Case No. C-1-99-317, available at <http://www.cincinnati-oh.gov/police/linkservid/27A205F1-69E9-4446-BC18BD146CB73DF2/showMeta/0/>.

⁵³ Civil rights attorneys Al Gerhardstein and Scott Greenwood, representing the ACLU, joined me as co-counsel.

⁵⁴ See generally *In re Cincinnati Policing*, *supra* note 52, at 2.

⁵⁵ *Id.*

⁵⁶ *Id.* at 2.

⁵⁷ *They Killed 15 Black Men. Now They're a Model Police Dept.*, BLOOMBERG TV (Dec. 11, 2014), <http://www.bloomberg.com/video/how-to-build-a-better-police-department-tYehWAcnR9~DUgXgAhoqZA.html> [hereinafter *They Killed 15 Black Men*].

adjectives. . . . [They] are the categories into which humans place the people, places and things in our lives to help our brains make sense of the world.”⁵⁸ Over time, these categorizations become so imprinted into our subconscious minds that we do not need to intentionally think about them in order for them to influence our actions.⁵⁹ For example, red means stop, green means go, fire means hot, and ice means cold. Our brains make these connections without having to think about them, at least not consciously. It is as though these connections have been hardwired into our brains.

Implicit associations are not necessarily problematic. By facilitating automatic decision-making on routine matters, they free up the mind to deal with more complex everyday life experiences,⁶⁰ such as engaging in everyday problem solving at work or at school, planning our day, communicating with friends and associates, as well as many other experiences. In fact, we cannot function normally and effectively without them.⁶¹ But faulty associations, such as “female and frail” and “Black and dangerous” can become the basis of implicit prejudice.⁶² One reason for such associations is that we humans are wired to view our own groups as superior to others and to exaggerate differences between our own group and outsiders.⁶³ Unfortunately, many implicit associations about social groups form at a young age, with some research showing implicit racial bias emerging by age six.⁶⁴ These associations are the result of deep-rooted cultural stereotypes in our country that we can pick up from almost every aspect of our environment: homes, schools, playgrounds, athletic teams, churches, television, newspapers, and movies, to name a few. Being exposed to racial stereotypes continuously from a young age inevitably leads to implicit associations and implicit racial bias.⁶⁵

It is important to note that many implicit associations do not necessarily reflect our motives, morals, and convictions, resulting in automatic actions that are inconsistent with our conscious beliefs and values.⁶⁶ The reflexive

⁵⁸ John Tyler Clemons, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 692 (2014).

⁵⁹ Siri Carpenter, *Buried Prejudice*, SCI. AM. MIND, 34 (Apr./May 2008), available at <http://siricarpenter.com/wp-content/uploads/2010/02/Buried-Prejudice1.pdf>.

⁶⁰ Clemons, *supra* note 58.

⁶¹ Carpenter, *supra* note 59.

⁶² *Id.*

⁶³ *Id.* We are also more likely to remember the faces of people of our own race more readily than the faces of others.

⁶⁴ *Id.* at 35.

⁶⁵ See Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations From Ages 6 and 10 and Adulthood*, 17 PSYCHOL. SCI. 53 (2006).

⁶⁶ Carpenter, *supra* note 59.

nature of these automatic associations should not be confused with the explicit attitudes and beliefs everyone has on certain subjects. Research suggests that “people can have dual attitudes, which are different evaluations of the same attitude object, one of which is an automatic, implicit attitude and the other of which is an explicit attitude.”⁶⁷ One implication of this theory is that although people feel strongly about their explicit attitudes and beliefs, previously established implicit attitudes may still control their reactions, especially in circumstances requiring fast responses.⁶⁸ Civil rights leader Jesse Jackson offers a compelling example of this. At a conference in 1993, Reverend Jackson stated, “There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery—then look around and see somebody White and feel relieved.”⁶⁹

Research suggests that implicit attitudes are closely associated with a person’s overall mindset and may often win or take precedence over new, explicit attitudes.⁷⁰ Thus, the development of new attitudes may demand more effort and patience than formerly thought.⁷¹ Because implicit associations have such power over the subconscious mind, they are the key to understanding underlying racial bias in police shootings.

B. Implicit Association Tests

Implicit bias has been accurately measured for years through the Implicit Association Test (“IAT”).⁷² The IAT evaluates how quickly people categorize stimuli,⁷³ which can be used to show how racial bias based on learned stereotypes translates into automatic decision-making. The Race IAT is particularly relevant to the study of implicit racial bias. This test indicates that most Americans have an automatic preference for Whites over Blacks.⁷⁴

⁶⁷ Timothy D. Wilson, Samuel Lindsey, & Tonya Y. Schooler, *A Model of Dual Attitudes*, 107 PSYCHOL. REV. 101, 102 (2000).

⁶⁸ *Id.* at 121.

⁶⁹ Bob Herbert, *In America: A Sea Change On Crime*, N.Y. TIMES (Dec. 12, 1993), available at <http://www.nytimes.com/1993/12/12/opinion/in-america-a-sea-change-on-crime.html> (quoting Jesse Jackson, remarks at a meeting of Operation PUSH in Chicago on Nov. 27, 1993).

⁷⁰ Wilson et al., *supra* note 67, at 121.

⁷¹ *Id.*

⁷² Carpenter, *supra* note 59, at 39 (describing the Implicit Association Test, introduced in 1998 and used in more than 500 studies of implicit bias, as the most prominent method for measuring implicit bias).

⁷³ *Id.*

⁷⁴ PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/selectatest.html> (last visited

The test asks you to rapidly categorize images of faces as either “African American” or “European American” while you also categorize words (like “evil,” “happy,” “awful,” and “peace”) as either “good” or “bad.” Faces and words flash on the screen, and you tap a key, as fast as you can, to indicate which category is appropriate.

Sometimes you’re asked to sort African American faces and “good” words to one side of the screen. Other times, black faces are to be sorted with “bad” words. As words and faces keep flashing by, you struggle not to make too many sorting mistakes.⁷⁵

One author explained the experience as “both extremely simple and pretty traumatic,” adding, “you think of yourself as a person who strives to be unprejudiced, but you can’t control these split-second reactions.”⁷⁶ This individual’s reaction to the test is not uncommon—51% of online test takers show a moderate to strong bias.⁷⁷ The author further commented: “Suddenly, you have a horrible realization. When Black faces and ‘bad’ words are paired together, you feel yourself becoming faster in your categorizing—an indication that the two are more easily linked in your mind.”⁷⁸ In order to both acknowledge and attempt to counteract such implicit racial bias, it is important to understand some of the racial stereotypes that have permeated the American psyche for over 300 years.

III. CULTURALLY IMBEDDED RACIAL STEREOTYPES

A. *The Dehumanizing of Black Men*

No matter how open-minded people might perceive themselves to be, implicit racial bias is present in nearly everyone. Such widespread yet implicit bias is a product of stereotypes that have been deeply embedded within American culture.⁷⁹ The police shootings of unarmed Black men today have roots in stereotypes that began centuries ago.⁸⁰ Although a complete history of racial stereotypes goes beyond the scope of this paper,

Dec. 31, 2014) (explaining that the Race IAT requires the ability to distinguish faces of European and African origin--this and other IATs can be taken at this website).

⁷⁵ Chris Mooney, *The Science of Why Cops Shoot Young Black Men*, MOTHER JONES (Dec. 1, 2014), <http://www.motherjones.com/politics/2014/11/science-of-racism-prejudice>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1557-1610 (2013).

⁸⁰ See Nicole Hipp, *Historical Beginnings and Development of Black Men Stereotypes in American Society*, STEREOTYPES ON THE BLACK MALE IN REALITY TV <http://stereotypeproject.wordpress.com/nicole-hipps-paper/> (last visited Jan. 1, 2015).

it is important to touch on some of these stereotypes in order to add context to the killing of Black males by law enforcement. These stereotypes can easily be traced back to the era of legalized slavery.⁸¹

1. Characterization of Blacks during slavery and the Jim Crow era

Negative racial stereotypes about Black men grew deep roots during the legal institution of slavery in the United States, which lasted for 240 years, from 1620 to 1865.⁸² Blacks were property, and in many states it was a crime to educate Blacks.⁸³ They were viewed by Whites as childlike and as needing the guidance of the superior White race.⁸⁴ This myth allowed many slave owners and Whites to accept slavery as a system that was the most humane thing a superior race could do for their inferiors, while slave owners conveniently reaped the economic benefit of free labor. But slavery persisted only because so many people had convinced themselves that it was not inherently immoral. As long as slave masters “took good care” of their slaves, those slaves were expected to remain docile and be good workers.⁸⁵

The Dred Scott case demonstrates how Blacks were viewed during slavery. Scott, upon being taken by his owners from a slave state to a state that had abolished slavery, sued for his freedom.⁸⁶ In ruling that a Black man, whether he be free or a slave, was not a citizen and thus could not sue in federal court, Chief Justice Roger B. Taney of the United States Supreme Court stated:

[Blacks] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the White man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See RANDALL M. MILLER & JOHN DAVID SMITH, *DICTIONARY OF AFRO-AMERICAN SLAVERY* 565 (1997) (describing the comic Sambo slave imagery present in the South in the 1800s).

⁸⁵ See *id.* at 452 (describing the paternalistic master-slave relationship).

⁸⁶ *Scott v. Sandford*, 60 U.S. 393, 397-98 (1856).

acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.⁸⁷

The characterization of Blacks as simple-minded and childlike evolved slowly after the abolishment of slavery. Shortly after the Emancipation Proclamation, newspapers and books continued to traffic propaganda that portrayed Black males as brutes and animals.⁸⁸ These efforts assured the White public that, although slavery had been abolished, Blacks were still an inferior race of people who needed to be taken care of and controlled. Jim Crow laws kept Blacks from voting, owning land or otherwise becoming equals under the Constitution.⁸⁹ Portraying Black men as beasts, apes, and monkeys encouraged fear of Black men, which made it easier to justify lynching and terrorizing the supposedly dangerous black man.⁹⁰ Between Reconstruction and the Second World War, from 1882 to 1951, approximately 4,700 Black people were lynched in the United States.⁹¹ Fear of Blacks coupled with rhetoric from the Ku Klux Klan sparked numerous lynchings.⁹²

2. Portrayal of Blacks in pop culture

The stereotypical image of the brutish, animalistic Black buck, with a craving for raping White women, made its Hollywood debut in the 1915 D.W. Griffith film, "The Birth of a Nation."⁹³ The story took place in a small southern town named Piedmont shortly after the Civil War and the emancipation of slaves.⁹⁴ Gus, the Black brute, sets out to rape a White girl, who jumps off a cliff rather than be touched by the brute.⁹⁵ A mulatto

⁸⁷ *Id.* at 407.

⁸⁸ See *Caricatures of African Americans: The Brute*, <http://www.authentichistory.com/diversity/african/4-brute/> (last visited Jan. 23, 2015).

⁸⁹ See Danny Brooke, *The African Americans: Many Rivers to Cross: Making a Way Out of No Way, 1897-1940*, PBS, <https://www.youtube.com/watch?v=JIOH8QvaLS0> (last visited Jan. 4, 2014).

⁹⁰ *Id.*

⁹¹ HELEN TAYLOR GREENE & SHAUN L. GABBIDON, *ENCYCLOPEDIA OF RACE AND CRIME* 248-49 (2009).

⁹² Brooke, *supra* note 89.

⁹³ Tim Dirks, *The Birth of a Nation (1915)*, AMC FILMSITE, <http://www.filmsite.org/birt.html> (last visited Jan. 23, 2015). This stereotype was also used to keep Black men and White women from engaging in consensual sex. Many states went as far as passing laws making it illegal for Blacks and Whites to marry and it was not until 1967 that the Supreme Court of United States finally ruled it unconstitutional. See *Loving v. Virginia*, 388 U.S. 1 (1967).

⁹⁴ Tim Dirks, *The Birth of a Nation (1915)*, AMC FILMSITE <http://www.filmsite.org/birt.html> (last visited Jan. 23, 2015).

⁹⁵ *Id.*

named Silas Lynch attempts to force a White woman to marry him.⁹⁶ The only hope for this town, if it is to save its good people from the Blacks, is the Ku Klux Klan.⁹⁷ The film's "happy ending" occurs when the Klan comes in, kills the Black bucks, and restores the town to White supremacy.⁹⁸ This film, which was advertised as an authentic and accurate depiction of life in America, was wildly successful at the box office.⁹⁹

Around the turn of the twentieth century, postcards, books, and newspaper comics depicted Blacks as apes and monkeys.¹⁰⁰ Even cartoons were not off limits. "Scrub Me Mamma with a Boogie Beat," a 1941 cartoon, portrayed Black men as slow, lazy, attracting flies, moving in slow motion, and with facial features like those of monkeys and apes.¹⁰¹ Even Disney's all-American mouse, Mickey, was also active in portraying Blacks as savages and cannibals with apelike features.¹⁰² A 1968 Hollywood film, "Planet of the Apes," was viewed by White supremacists and perhaps some others as an example of how Blacks will rise up against Whites if given the opportunity to do so.¹⁰³

Racist depictions are not just a thing of the past. Numerous racist cartoons of President Obama and the First Lady portray them as monkeys or apes. The *New York Post* published a cartoon by famed political cartoonist Sean Delonas on February 18, 2009, showing two officers looking over a bleeding, shot, rabid chimpanzee with the caption reading "[t]hey'll have to find someone else to write the next stimulus bill."¹⁰⁴ The *New York Post* eventually apologized for the racist cartoon.¹⁰⁵ Such imagery of Blacks, especially Black men being portrayed as apes, has become even more prevalent since the dawn of the Internet. A simple Google search of the phrase "racist images of Blacks and apes" during the writing of this article produced 607,000 results, including numerous images

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See *The Coon Caricature: Blacks as Monkeys*, <http://www.authentichistory.com/diversity/african/3-coon/6-monkey/> (last visited Jan. 23, 2015).

¹⁰¹ SCRUB ME MAMA WITH A BOOGIE BEAT (Universal Pictures 1941), available at <http://youtu.be/UacUR7bPnMM>.

¹⁰² TRADER MICKEY (Disney 1932), available at http://youtu.be/AvEwkFhB_Qo.

¹⁰³ See ERIC GREENE, *PLANET OF THE APES AS AMERICAN MYTH* (2006).

¹⁰⁴ Oliver Burkeman, *New York Post in Racism Row Over Chimpanzee Cartoon*, THE GUARDIAN (Feb. 18, 2009, 1:58 PM), <http://www.theguardian.com/world/2009/feb/18/new-york-post-cartoon-race>.

¹⁰⁵ Sewell Chan, *New York Post Apologizes for Chimp Cartoon*, N.Y. TIMES (Feb. 19, 2009, 9:47 PM), <http://cityroom.blogs.nytimes.com/2009/02/19/new-york-post-apologizes-for-chimp-cartoon/>.

of Blacks photoshopped as monkeys and apes—including President Barack Obama and the First Lady.¹⁰⁶

Recent research regarding dehumanization of Blacks has indicated that people subconsciously and automatically associate Blacks with apes.¹⁰⁷ Other studies have produced similar evidence of stereotypes associating Blacks with animals. In one such study, an IAT was used to determine the degree to which police officers associate Blacks and apes.¹⁰⁸ The officers who demonstrated a high degree of association between these two concepts were then shown photos of White, Black and Latino juveniles.¹⁰⁹ The officers who closely associated Blacks with apes grossly overestimated the age of the Black juveniles.¹¹⁰ This misidentification of Black children as adults by officers who implicitly associate Blacks with apes may be a troubling predictor of an officer's likelihood of using deadly force when confronting a young Black male. In the police shooting of Tamir Rice (discussed in detail *infra*), the officer thought the twelve-year-old boy was an adult at the moment of the fatal shooting.¹¹¹

B. The Black Athlete: How super-humanization actually dehumanizes Black males

The Black is a better athlete to begin with because he's been bred to be that way, because of his high thighs and big thighs that goes up into his back, and they can jump higher and run faster because of their bigger thighs and he's bred to be the better athlete because this goes back all the way to the Civil War when during the slave trade . . . the slave owner would breed his big Black to his big woman so that he could have a big kid.¹¹²

¹⁰⁶ Google Search, <https://www.google.com/search?q=racist+images+of+Blacks+and+apes&ie=utf-8&oe=utf-8> (last visited Jan. 2, 2014).

¹⁰⁷ See Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292-306 (2008).

¹⁰⁸ Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 306 (2012).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Associated Press, *Cleveland Cop Who Killed 12-year-old Tamir Rice Not Told Boy's Age, That Gun Might Be Fake: Union*, DAILY NEWS <http://www.nydailynews.com/news/national/12-year-old-tamir-rice-shot-cleveland-autopsy-article-1.2043229> (last updated Dec. 13, 2014, 1:15 PM) (reporting the officers thought they were confronting someone around twenty years old).

¹¹² ESPN 30 for 30: *The Legend of Jimmy the Greek* (ESPN television broadcast Nov. 10, 2009); see also, Jonathan Rowe, *The Greek Chorus, Jimmy the Greek Got it Wrong But so Did His Critics*, WASHINGTON MONTHLY COMPANY (1998), <http://www.thefreelibrary.com/The+Greek+chorus,+Jimmy+the+Greek+got+it+wrong+but+so+did+his+critics.->

– Jimmy “The Greek” Snyder

The idea that Blacks dominate in sports because of innate abilities, which can be traced to slavery or back to Africa, is a stereotype that further dehumanizes Black men. According to psychologist Harry Edwards, this type of thinking perpetuates the myth that Blacks, like animals, excel physically but lack the intellectual ability to think and reason at the level of other humans.¹¹³ Throughout the past few decades, statements such as the one made by Jimmy “The Greek” have been echoed by many. Such public utterances have usually been quickly followed by a public apology for the indiscretion, but the candid nature of these comments exposes how the idea that Black bodies are engineered for strong physical performance is sometimes regarded as fact, even in the minds of well-known and respected individuals. Three examples come from three high-profile figures in the sports world, each of whom is widely regarded as a genuinely good person: Al Campanis, Jack Nicklaus, and Jon Gruden.

Al Campanis, who played major league baseball alongside Jackie Robinson, made headlines in 1987 when he appeared on the TV show “Nightline,” then hosted by Ted Koppel.¹¹⁴ The show celebrated the 40-year anniversary of Jackie Robinson breaking Major League Baseball’s (“MLB”) color barrier by becoming its first Black player. During the show, Ted Koppel asked Campanis why there were no Black managers of MLB teams. Campanis’ response was honest but ignorant when he stated that Blacks “may not have some of the necessities to be a field manager or general manager” of an MLB team.¹¹⁵ Campanis explained that Blacks were physically different from other races, stating that Blacks “are gifted athletically,” and then adding: “[W]hy aren’t Blacks good swimmers? Because they don’t have buoyancy.”¹¹⁶ Even though Campanis had been Jackie Robinson’s roommate decades earlier and was arguably not racist, his statements revealed underlying discriminatory beliefs about Black athletes.¹¹⁷

In 1994, Professional golfer Jack Nicklaus explained why there were so few Black professional golfers: “[Blacks have] different muscles [that]

a06536853.

¹¹³ JON ENTINE, TABOO: WHY BLACK ATHLETES DOMINATE SPORTS AND WHY WE’RE AFRAID TO TALK ABOUT IT 4 (2000).

¹¹⁴ See Grahame L. Jones, *Dodgers Fire Campanis Over Racial Remarks*, L.A. TIMES (Apr. 9, 1987), http://articles.latimes.com/1987-04-09/news/mn-366_1_black-leaders.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *The Night Al Campanis Shocked the World*, SPORTS IN BLACK AND WHITE (Mar. 5 2013), <http://www.sportsinblackandwhite.com/2013/03/05/the-night-al-campanis-shocked-the-world/> (last visited Dec. 20, 2014).

react in different ways. . . . People gravitate to the sports [depending] on how their bodies develop.”¹¹⁸ Nicklaus later apologized for the remark.¹¹⁹ Yet, his statement shows how deeply ingrained stereotypes are and how a well-respected, intelligent man can think it rational to believe that the relatively low number of professional Black golfers is due to genetic and anatomical differences, rather than lack of exposure or access to golfing opportunities, due to social structural inequality.

On January 1, 2013, while announcing a college bowl game, television football commentator Jon Gruden referred to Jadeveon Clowney, who is Black and at that time was the future number one draft choice in the NFL, as a “beast” after Clowney made a particularly hard tackle during the game.¹²⁰ There is little doubt that Gruden intended his comment to be a compliment to Clowney’s athletic ability. Nevertheless, it portrays an intelligent, young Black man as little more than an animal. Granted, the term “beast” has been adopted by many as slang for someone with great skill and intensity. However, during the same game, Gruden commented on the play of a White linebacker with long blond hair by saying, “Jake Ryan is a fine player from St. Ignatius High School in Ohio. I know exactly what kind of stock he comes from.”¹²¹ The difference in the type of language used to characterize the performance of these two players suggests a discrepancy in the ways their skill sets are being assessed. Gruden regards Clowney’s performance as animalistic but attributes Ryan’s excellence to a good upbringing by inherently good people. The comments of such individuals cannot be brushed aside as the sentiments of a few ignorant outliers; rather, they are public expressions of popular, though inaccurate, beliefs.

These beliefs may seem flattering at some level, but studies suggest that this “super-humanization” of Blacks, rather than a form of admiration, implies that Blacks lack normal human capacities and attributes.¹²² For example, a recent study indicates that Whites who implicitly attribute superior physical qualities to Blacks consequently believe that Blacks have

¹¹⁸ Mike Kern, *Nicklaus: Quotes Not Meant to be Racist* (Aug. 10, 1994), http://articles.philly.com/1994-08-10/sports/25840807_1_position-and-feelings-initial-comments-andy-o-brien.

¹¹⁹ *Id.*

¹²⁰ Jon Gruden’s “Beast” Comment Reflects Disparities in Media Coverage of Black Athletes, *CULTUREGEIST* (Jan. 1, 2013), <http://theculturegeist.blogspot.com/2013/01/i-am-not-animal-jon-grudens-beast.html> (last visited Dec. 26, 2014).

¹²¹ *Id.*

¹²² Adam Waytz et al., *A Superhumanization Bias in Whites’ Perceptions of Blacks*, *J. SOC. PSYCHOL. & PERSONALITY SCI.* (Oct. 8, 2014), http://www.academia.edu/9506154/A_superhumanization_bias_in_Whites_perceptions_of_Blacks.

a relatively high tolerance for pain.¹²³ This belief may help explain why Blacks are routinely undertreated for pain.¹²⁴ Researchers also suggest that this particular misperception plays a role in police brutality against Black males because officers believe their bodies can withstand greater amounts of violence.¹²⁵ The distortion of the Black male body as a superhuman vessel is a form of dehumanization that may encourage police to use excessive force when dealing with Black suspects.

C. *The Scary Black Man*

Scary stories are very much about the idea of truth. What is truth, what is a lie, and what happens when you lie? For me the greatest horror out of anything you do is to lie, and so in any instance of great scary storytelling, there's a lie.¹²⁶

– Brad Falchuk, co-creator of *American Horror Story*

Implicit and explicit racial bias in the United States runs deep,¹²⁷ and the myth of the scary Black man, like Michael Myers from the movie *Halloween*, just won't stop.¹²⁸ Numerous cases in which White assailants have successfully raised the Black "boogie man" as a scapegoat demonstrate how relatively quickly many Americans will attribute violent crimes to Black men without delving into the facts.

An infamous example is the case of Charles Stuart, who, in 1989, shot and killed his pregnant wife Carol, then blamed the shooting on a Black man—not a specific person who happened to be Black, but a Black man.¹²⁹

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Joe Berkowitz, *How to Tell Scary Stories, From the Co-Creator of "American Horror Story"*, FAST COMPANY, <http://www.fastcreate.com/3020837/how-to-tell-scary-stories-from-the-co-creator-of-american-horror-story> (last visited Jan. 23, 2015).

¹²⁷ See, e.g., Braden Goyette & Alissa Scheller, *15 Charts That Prove We're Far From Post-Racial*, THE HUFFINGTON POST (July 2, 2014), http://www.huffingtonpost.com/2014/07/02/civil-rights-act-anniversary-racism-charts_n_5521104.html (describing racial disparities that still exist 50 years after the Civil Rights Act was signed into law. The data includes neighborhood poverty rates; share of wealth and wealth gap; subprime lending rates and home mortgage denial; school funding, segregation and punishment; perceptions of innocence, drug arrests and prison sentencing; and employment discrimination).

¹²⁸ See HALLOWEEN (Compass International Pictures, 1978).

¹²⁹ Roberto Scalese & Hilary Sargent, *The Charles Stuart Murders and the Racist Branding Boston Just Can't Seem to Shake*, BOSTON.COM (Oct. 22, 2014, 10:02 PM), <http://www.boston.com/news/local/massachusetts/2014/10/22/the-charles-stuart-murder-and-the-racist-branding-boston-just-can-seem-shake/RJpeNkL6EQbi8JCAMgfQPN/story.html>.

The abstract Black man immediately was seen as a more plausible suspect than Stuart. The community of Boston was in an uproar. There was even talk amongst some politicians of renewing the death penalty.¹³⁰ Black men throughout Boston were subject to police harassment, including illegal arrest, searches, and seizures.¹³¹ Eventually, Charles Stuart killed himself when his story began to unravel and his brother came forward with the truth.¹³² What is significant about this case is not that Stuart blamed someone else for his wife's murder, but the quickness with which the public was willing to latch onto the prospect of an unknown, scary Black man having committed this crime, with the true criminal hiding in plain sight.

A similar case unfolded in 1994 when Susan Smith drowned her little boys, aged three and fourteen months, by strapping them into their car seats and letting the car slowly roll into a lake.¹³³ She then reported to the police that her car had been stolen by a Black man with her children still inside.¹³⁴ Within twenty-four hours, the story was national news, and a regional manhunt for the Black man had begun. Nine days later, Smith confessed to killing her children, and she is now serving a life sentence.¹³⁵

Shortly after Smith confessed to killing her own boys, *The New York Times* noted that "Mrs. Smith had chosen the right-colored monster to generate the most sympathy and fear for her plight, especially in the hearts of Whites."¹³⁶ A White school psychologist was quoted in the article: "It did make her story seem more likely. I wouldn't like to think we're all prejudiced, but I guess there's that typical profile of the old bad Black guy. We're just too ready to accept that."¹³⁷ Police officers are not immune to these myths and stereotypes.

¹³⁰ *Id.*

¹³¹ After holding homeless Black man Alan Swanson for three weeks, police focused on new suspect William Bennett, who was roughly the right age and height as the alleged gunman and had a history of committing violent crimes. The mayor subsequently apologized to Bennett, who sued the Boston Police Department in 1995 for violating his civil rights. *Id.*

¹³² *Id.*

¹³³ Charles Montaldo, *Susan Smith – Profile of a Child Killer*, CRIME.COM (updated Dec. 15, 2014), http://crime.about.com/od/murder/a/susan_smith_2.htm (last visited Dec. 21, 2014).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Don Terry, *A Woman's False Accusation Pains Many Blacks*, N.Y. TIMES (Nov. 6, 1994), available at <http://www.nytimes.com/1994/11/06/us/a-woman-s-false-accusation-pains-many-blacks.html>.

¹³⁷ *Id.*

IV. IMPLICIT BIAS AND POLICE SHOOTINGS

A. Implicit Shooter Bias

Racial bias in police shootings—that is, police shooting unarmed Black men at a significantly higher rate than Whites—has been well documented. For example, an analysis of federally collected data on police shootings shows young Black males were twenty-one times more likely of being shot dead by police than their White counterparts in recent years.¹³⁸ The details of the following selected cases help to illustrate and begin to explain this phenomenon.

In 1999, four New York City police officers, in unmarked cars and street clothes, shot and killed Amadou Diallo claiming that they thought he was reaching for a gun when in fact he was just reaching for his wallet.¹³⁹ The officers shot Diallo forty-one times striking him with nineteen bullets.¹⁴⁰ After a trial in a different venue,¹⁴¹ the officers were acquitted of all charges.¹⁴² The jury agreed with the defense lawyer who “assert[ed] that the shooting was justified because [the officers] had believed Mr. Diallo was grabbing a gun.”¹⁴³ The Diallo shooting as well as the jury’s not-guilty verdict caught the attention of the entire nation, and caused a graduate student named Joshua Correll to wonder if the officers would have responded differently had it been a White man reaching for his wallet.¹⁴⁴ Following up on research showing that people perceive the same mildly aggressive behavior as more threatening when it is performed by a Black person than by a White person, Correll investigated the effect of a target’s race/color on the participants’ decision to shoot that target.¹⁴⁵

¹³⁸ Ryan Gabrielson, Ryan Grochowski Jones, & Eric Sagara, *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014), <http://www.propublica.org/article/deadly-force-in-black-and-white> (reviewing a compilation of federal data from 2010 to 2012).

¹³⁹ Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting are Acquitted of All Charges*, N.Y. TIMES (Feb. 26, 2000), <http://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (“The trial was moved to Albany after lawyers for the officers persuaded an appeals court that the ‘public clamor’ over the shooting made a fair trial impossible in the Bronx.”).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002).

¹⁴⁵ *Id.* at 1314-15.

Correll's study used a simplified video game to present Black and White male targets, each holding either a gun or a nonthreatening object.¹⁴⁶ Participants were instructed to shoot only armed targets, but to make each decision immediately after seeing each target.¹⁴⁷ The results pointed to racial bias in shoot/don't shoot decisions: participants fired on an armed target more quickly when he was Black than when he was White,¹⁴⁸ and they decided not to shoot the unarmed targets more quickly when the target was White than when he was Black.¹⁴⁹ In another study, participants failed to shoot an armed target more often when the target was White than when he was Black, and if the target was unarmed, they mistakenly shot him more often when he was Black than when he was White.¹⁵⁰ Further inquiry into these results found that if a target was Black, the participants required less certainty that he was, in fact, holding a gun before they decided to shoot.¹⁵¹

Correll's study also found that White and Black participants had equal levels of shooter bias.¹⁵² The race/color of the shooter does not matter. All Americans are subject to the same "[c]ultural influences, including television, movies, music, and newspapers [that] provide a constant barrage of information that often depicts [Blacks] as violent."¹⁵³ Even when a person does not endorse them, such cultural stereotypes can be subconsciously triggered.¹⁵⁴ Indeed, Correll's study confirmed that shooter bias was related to perceptions of the cultural stereotype of Blacks.¹⁵⁵ The bias was not necessarily related to prejudice or personally endorsed stereotypes—mere knowledge of the stereotype was enough to induce the bias.¹⁵⁶ Correll's shoot/don't-shoot studies suggest that no matter the race/color of the shooter, Black targets are shot at a higher rate than their White counterparts. His research supports the theory that although a person's explicit, aspirational attitude may be non-racist, their implicit associations influence their immediate decisions.

¹⁴⁶ *Id.* at 1315.

¹⁴⁷ *Id.* at 1324.

¹⁴⁸ *Id.* at 1325.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 1323 (citing CAMILLE O. COSBY, *TELEVISION'S IMAGEABLE INFLUENCE: THE SELF-PERCEPTION OF YOUNG AMERICANS* (1st ed. 1994)).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1325; see, e.g., Banaji & Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 2 (1995).

¹⁵⁶ *Id.*

Quite frequently, police officers are confronted with a situation that may require the use of deadly force. The way they view the suspect and assess the need for deadly force occurs in a matter of seconds. Often a police shooting of an unarmed Black man appears to be influenced by the stereotypical fear of the Black man. To demonstrate that a stereotype of Black men as violent and criminal affects policing, a 2004 study presented 182 police officers with Black and White faces.¹⁵⁷ The officers were asked to indicate whether they thought each face “looked criminal.”¹⁵⁸ As predicted, Black faces looked more criminal to police officers, and the darker the face, the more criminal the officer tended to think the person was.¹⁵⁹ These results reveal that police associate Blacks with crime.

In 2007 Correll tested the shooter bias of police officers.¹⁶⁰ The results showed that police officers were overall less “trigger happy” than the community sample: they were faster to make correct responses and better able to detect the presence of a weapon.¹⁶¹ This makes sense given their training. However, the officers still showed “robust racial bias in the speed with which they made shoot/don’t-shoot decisions.”¹⁶² It took the officers significantly longer to respond to situations that went against stereotypes (i.e., unarmed Black targets and armed White targets) than it did to respond to situations that align with cultural stereotypes (i.e., armed Black targets and unarmed White targets).¹⁶³ So although officers performed better than civilians, the shoot/don’t-shoot data still clearly indicates that the race/color of the suspect is a factor when officers make the decision to shoot.

B. How to Tell a Scary Story

In police shootings of unarmed Black men, there seems to be a common storyline that often emerges, with the officer insisting the situation necessitated the use of deadly force. In cases of questionable shootings, officers come up with all kinds of reasons, sometimes absurd, to justify shooting unarmed suspects.¹⁶⁴ A common excuse for shooting unarmed

¹⁵⁷ Jennifer L. Eberhardt, *Seeing Black: Race, Crime, and Visual Processing*, 86 J. PERSONALITY & SOC. PSYCHOL. 876, 888 (2004).

¹⁵⁸ *Id.* at 888.

¹⁵⁹ *Id.* at 889.

¹⁶⁰ See Joshua Correll, et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006 (2007).

¹⁶¹ *Id.* at 1020.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See, e.g., Jessica Dickerson, *9 Absurd Justifications for Police Killings of Unarmed Black Males*, THE HUFFINGTON POST (Dec. 15, 2014, 7:59 PM), http://www.huffingtonpost.com/2014/12/15/police-killing-black-men_n_6277020.html.

Black men, as noted in the Cincinnati police shooting of Timothy Thomas, is "he moved his hands towards his waistband."¹⁶⁵ In those instances where there happens to be a video recording or objective witnesses, it often turns out that the officer's account was exaggerated or, in some cases, fabricated.¹⁶⁶ The officer often wants time "to get his story straight," before being questioned about the details of the shooting, and then describes the unarmed Black victim as the aggressor, to justify the shooting as a proper use of deadly force. Unlike other murder suspects, officers in such cases are generally given substantial time and opportunity to "get their story right."

It is imperative that the police try to get a statement from the suspect and witnesses to a shooting as soon as possible and to keep the suspect isolated.¹⁶⁷ The more time that goes by between the crime and the interrogation, the greater the chance the suspect has to create a story that will exculpate him from criminal liability, so confessions by suspects are extremely important in a homicide investigation.¹⁶⁸ Yet investigators have actually compromised investigations of officers in shooting and excessive use of force cases, "by investigators' apparent bias in favor of clearing the officer instead of objectively pursuing all of the available facts."¹⁶⁹

The Fifth Amendment to the United States Constitution generally allows persons accused of a crime the right to remain silent when questioned by law enforcement.¹⁷⁰ Police officers involved in shootings may have additional protections because of collective bargaining contracts between their police union and their employer. For example, according to the International Association of Chiefs of Police's Officer-Involved Shooting Guidelines, "[w]henenever possible, officers should be educated on the protocol of the investigation as well as any potential actions by the media,

¹⁶⁵ Arthur Delaney & Diane Jeanty, *Police Shootings of Unarmed Men Often Have Something in Common: The Waistband Defense*, THE HUFFINGTON POST (Dec. 10, 2014, 9:59 PM), http://www.huffingtonpost.com/2014/12/10/police-shootings_n_6303846.html; John Larson, *Behind the Death of Timothy Thomas*, DATELINE NBC (Apr. 10, 2004, 12:36am), http://www.nbcnews.com/id/4703574/ns/dateline_nbc-dateline_specials/t/behind-death-timothy-thomas/#.VMLm3cY-Aag.

¹⁶⁶ See, e.g., Jay Hathaway, *Lawyer: Video Shows Cops Shot John Crawford "On Sight" at Walmart*, GAWKER (Aug. 28, 2014, 1:50 PM), <http://gawker.com/lawyer-video-shows-cops-shot-john-crawford-on-sight-1627942888>; see also Santaella & Dial, *supra* note 8.

¹⁶⁷ Saul M. Kassin et al., *Interviewing Suspects: Practice, Science, and Future Directions*, 15 LEGAL & CRIM. PSYCHOL. 39, 42 (2009).

¹⁶⁸ David D. Tousignant, *Why Suspects Confess*, FBI LAW ENFORCEMENT BULLETIN, 1 (Mar. 1991).

¹⁶⁹ U.S. DEPT. OF JUSTICE, INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 34 (Dec. 4, 2014).

¹⁷⁰ U.S. CONST. amend. V.

grand jury, or review board *prior* to any formal investigative interviews.”¹⁷¹ This means the officer is usually allowed time to meet with an attorney or union representative prior to being questioned, and the interview may not even occur the same day as the shooting.¹⁷² Contrast this with the routine practice in homicide cases, where officers obtain and document statements by suspects as soon as possible—limited only by the reading of the suspect’s *Miranda* warning.¹⁷³

Even when a police officer makes a statement to his employer or union, the statement cannot always be used against him criminally. Under the *Garrity* rule, public employees—including police officers—can be compelled to give a statement to an employer, but those statements cannot be used against them in criminal proceedings. In *Garrity*, police officers who were under investigation found themselves between a rock and hard place when compelled by their department to talk or be fired.¹⁷⁴ The officers spoke, then were indicted and convicted.¹⁷⁵ They appealed, arguing that compelling them to speak under threat of being fired was coercive.¹⁷⁶ The Supreme Court agreed and held that “the protection of individuals under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat or removal from office.”¹⁷⁷ Thus, officers who incriminate themselves for employment purposes may still be able to invoke their Fifth Amendment right against self-incrimination in criminal proceedings. Because of *Garrity*, employees who are subject to an internal investigation are generally advised of these rights prior to questioning.¹⁷⁸

¹⁷¹ *International Association of Chiefs of Police, Officer-Involved Shooting Guidelines* (2013), <http://www.theiacp.org/portals/0/documents/pdfs/Psych-OfficerInvolvedShooting.pdf> (emphasis added).

¹⁷² *See Documents Describe Ferguson Officer’s Version of Fatal Shooting*, CBS News (Nov. 25, 2014), <http://www.cbsnews.com/news/documents-describe-ferguson-officers-version-of-fatal-shooting/> (detailing how Officer Darren Wilson fatally shot Michael Brown on Aug. 9, 2014 and did not have a conversation with a police detective about the shooting until Aug. 10, 2014 with his attorney present).

¹⁷³ *See Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁷⁴ *Garrity v. State*, 385 U.S. 493, 494 (1967).

¹⁷⁵ *Id.* at 495.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 500.

¹⁷⁸ GARRITY “WARNINGS”, <http://www.garrityrights.org/garrity-warnings.html> (last visited Dec. 26, 2014) (including the right to be informed of the allegations involved; that statements made during any interviews may be used as evidence of misconduct or as the basis for seeking disciplinary action; that any statements made during the interviews cannot be used against the employee in any subsequent criminal proceeding, nor can the fruits of any of the statements be used against the employee in any subsequent criminal proceeding; and if the employee requests, a person of their choice may be present to serve as a witness).

However, the United States Department of Justice has recently found that some police departments are improperly applying *Garrity*, and thus jeopardizing criminal prosecutions of officers. While investigating the Seattle and Cleveland police departments, the DOJ found that officers were given *Garrity* warnings for any allegation of use of force, even when not required to do so.¹⁷⁹ The improper use of *Garrity* may severely interfere with the investigations and misconduct by officers.¹⁸⁰ In such cases, police officers are able to delay the interrogation and have a representative present—nothing said during the interrogation can be used in the criminal prosecution of the officer. By misusing *Garrity* in this way, officers can admit to wrongful conduct and their statements cannot be used against them in a criminal proceeding. The improper use of *Garrity* also allows the officers and their union attorneys or representatives more time to develop an exonerating account of the incident because the officer is allowed to confer with his or her representative prior to any questioning.

C. *Implicit Racial Bias in the Judicial System*

Prior to the 2014 riots in Ferguson and the 2001 riots in Cincinnati, the nation witnessed riots in Los Angeles in 1992 after a not-guilty verdict in the Rodney King case. King was a Black man who had been beaten by the police after leading them on a high-speed chase.¹⁸¹ The brutal beating was caught on videotape.¹⁸² Police used a Taser gun to bring King to the ground then struck him fifty-six times with their batons and kicked him in the head and body six times, mostly while King was on the ground.¹⁸³ The four officers who beat King were indicted by a grand jury.¹⁸⁴

The trial was moved out of racially mixed and culturally diverse Los Angeles to Simi Valley, a predominantly White, conservative area described by media as a “police officers’ bedroom community with a

¹⁷⁹ U.S. DEPT. OF JUSTICE, United States’ Investigation of the Seattle Police Department – *Garrity* Protections (Nov. 23, 2011); see also U.S. DEPT. OF JUSTICE, Investigation of the Cleveland Division of Police, 36-37 (Dec. 4, 2014).

¹⁸⁰ U.S. DEPT. OF JUSTICE, Investigation of the Cleveland Division of Police, 34 (Dec. 4, 2014).

¹⁸¹ Independent Commission on the Los Angeles Police Department, *Report of the Independent Commission on the Los Angeles Police Department*, 6-7 (July 9, 1991), http://www.parc.info/client_files/special%20reports/1%20-%20chistopher%20commision.pdf [hereinafter Ind. Comm. on the L.A.P.D.].

¹⁸² *Id.* at 3.

¹⁸³ *Id.* at 6-7.

¹⁸⁴ See Linda Deutsch, *Rodney King’s Death: Reporter Remembers Trial That Sparked Riots*, THE HUFFINGTON POST (June 18, 2012, 7:22 AM), http://www.huffingtonpost.com/2012/06/18/rodney-kings-death-report_n_1605085.html.

majority White population.”¹⁸⁵ There were no Blacks on the jury.¹⁸⁶ The defending officers and their lawyers forged a defense that would appeal to the implicit racial bias of the jurors. One defendant, Officer Koon, said he “felt threatened” when the “big and muscular” King (6’3” and 225 lbs.) stepped out of the car and that he believed King was under the influence of PCP.¹⁸⁷ The defendants and their counsel argued that King had not complied with their commands, which was why they continued using “power strokes” with their batons.¹⁸⁸

On April 29, 1992, the jury found all four officers not guilty of assault and was deadlocked on just one of the charges.¹⁸⁹ Soon after the verdicts were announced, riots began in Los Angeles.¹⁹⁰ Several months after the trial, legal journalist D.M. Osbourne interviewed some of the Simi Valley jurors.¹⁹¹ Osbourne found that the jurors had a “reverence for the police officers as guardians of social order” and their “low regard for the likes of King—a paroled felon, driving drunk and resisting arrest—made it inconceivable that they could sympathize with him as the victim of the alleged crime.”¹⁹²

The Cincinnati case of Timothy Thomas illustrates how implicit racial bias can also play a role in a non-jury trials. Announcing his decision from the bench, Judge Winkle stated: “Timothy Thomas put Police Officer Roach in a situation where he believed he had to shoot[.] Police Officer Roach’s history was unblemished until this incident. Timothy Thomas’ history was not unblemished.”¹⁹³ In both the *King* case and the *Thomas* case, the victim’s character ended up playing a role in the determination of whether the police used excessive force.

Implicit racial bias in police shooting cases can pervert the justice system to the point that the fact finder ends up making decisions on what has greater value—the career of a White police officer who protects and serves society every day, or the life of a dead Black male who was either a troublemaker or potential troublemaker. Implicit bias can also color how

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Ind. Comm. on the L.A.P.D., *supra* note 181, at 6.

¹⁸⁸ *Id.* at 7.

¹⁸⁹ Seth Mydans, *The Police Verdict: Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES (Apr. 30, 1992), <http://www.nytimes.com/books/98/02/08/home/rodney-verdict.html>.

¹⁹⁰ *Id.*

¹⁹¹ Bob Sipchen, *Analysis Backs Jury in Rodney King Trial*, L.A. TIMES (Sept. 24, 1992), http://articles.latimes.com/1992-09-24/news/vw-1191_1_rodney-king-trial.

¹⁹² *Id.*

¹⁹³ Cinn. Judge Stmt., *supra* note 50.

others view these cases, including the general public, grand juries and investigative bodies.

1. *The shooting of Trayvon Martin*

This guy looks like he's up to no good, or he's on drugs or something. It's raining and he's just walking around, looking about.¹⁹⁴

– George Zimmerman's 911 call

On July 13, 2013, a jury acquitted George Zimmerman of second-degree murder and manslaughter charges for killing Trayvon Martin, an unarmed Black teenager who was walking down the street wearing a “hoodie.”¹⁹⁵ Zimmerman followed Martin, reportedly because he thought the unarmed Black teenager looked “real suspicious,”¹⁹⁶ and fatally shot him after a confrontation.¹⁹⁷ Many critics of the verdict pointed to Florida's “Stand Your Ground” law as having influenced the jury's verdict,¹⁹⁸ but criticism was legally flawed and served only to distract from the core issue, which was why Zimmerman viewed Martin as suspicious when all Martin was doing was walking home from a store, armed only with Skittles and a can of iced tea.¹⁹⁹

Enacted in 2005, the Florida Stand Your Ground Law, as codified in sections 776.012 and 776.013 of Florida Statutes, provides that a person is justified in the use of deadly force and has no duty to retreat if either (1) the person reasonably believes that “such force is necessary to prevent imminent death or great bodily harm to himself or herself, or another or to prevent the imminent commission of a forcible felony;”²⁰⁰ or (2) the person acts under and according to the circumstances set forth in Section 776.013

¹⁹⁴ Transcript: *George Zimmerman's Call to Police*, MOTHER JONES, <http://www.documentcloud.org/documents/326700-full-transcript-zimmerman.html> (last visited Jan. 23, 2015).

¹⁹⁵ Lizette Alvarez & Cara Buckley, *Zimmerman is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html?pagewanted=all&_r=0.

¹⁹⁶ Zimmerman Transcript, *supra* note 194.

¹⁹⁷ Alvarez & Buckley, *supra* note 195.

¹⁹⁸ Pete Williams & Tracy Connor, *Holder Speaks Out Against “Stand Your Ground” Laws After Zimmerman Verdict*, NBC NEWS (July 17, 2013, 5:13 AM), <http://www.nbcnews.com/news/other/holder-speaks-out-against-stand-your-ground-laws-after-zimmerman-f6C10654061>.

¹⁹⁹ Trayvon had a bag of Skittles and a can of iced tea. Zimmerman had a 9-millimeter handgun. See Charles M. Blow, *The Curious Case of Trayvon Martin*, N.Y. TIMES (Mar. 16, 2012), http://www.nytimes.com/2012/03/17/opinion/blow-the-curious-case-of-trayvon-martin.html?_r=2.

²⁰⁰ See FLA. STAT. ANN. § 776.012 (West 2014).

(pertaining to the use of force in the context of a home or vehicle invasion).²⁰¹

Florida's Stand Your Ground Law, the notion of self-defense, and the duty to retreat are certainly important concepts in the abstract, but changing self-defense laws, in my opinion, will not prevent police shootings of unarmed Black men or lead to more indictments of officers.²⁰² Song Richardson and Phillip Atiba Goff have contended, "the best way to safeguard against mistaken judgments caused by the suspicion heuristic is to impose a duty to retreat when it is safe to do so."²⁰³ Even U.S. Attorney General Eric Holder spoke out against Florida's Stand Your Ground Law following the killing of Martin.²⁰⁴ Many shootings of unarmed Black males occur because of implicit racial bias (subjective fear). Thus, proposed changes to self-defense laws are unlikely to prevent acquittals in cases involving the shootings of unarmed Black males. For example, I have successfully defended homicide cases on claims of self-defense in Ohio, a state that, unlike Florida, has a duty to retreat.²⁰⁵ Imposing a duty retreat is not the solution in cases like Trayvon Martin. The defendants in some of these cases had killed unarmed victims, yet self-defense was successfully argued each time—despite a state law that imposes a duty to retreat anywhere but in your home or business. Even states that require a person to retreat before using deadly force do so *only* when it is safe for the person to do so.²⁰⁶ When a person reasonably believes that he is confronted with the threat of death or great bodily harm, there often is insufficient time for a safe retreat.

To establish self-defense in Ohio, a defendant must prove all of the following elements by a preponderance of the evidence: (A) that he was not at fault in creating the situation giving rise to the event; (B) that he had reasonable grounds to believe (an honest belief) that he was in imminent danger of death or great bodily harm; (C) that his only means of escape

²⁰¹ See *id.* § 776.013.

²⁰² See, e.g., Richardson & Goff, *supra* note 108, at 332.

²⁰³ *Id.*; see also *id.* at 307 (defining "suspicion heuristic" as a construct that relies upon the mind science of heuristics and biases on the one hand, and implicit racial associations on the other hand, to explain how merely perceiving race—even absent racial animus—can influence judgments of criminality beyond conscious awareness).

²⁰⁴ Williams & Connor, *supra* note 198.

²⁰⁵ See *State v. Coad*, No. B0108935 (Hamilton County Ct. Com. Pl., Ohio, 2002); see also *Ohio v. Hakim Kent*, No. B-9803756 (Hamilton County Ct. Com. Pl., Ohio, 1998); Dan Horn, *Self-Defense Claim Wins Bar Employee Acquittal in Killing*, THE CINCINNATI ENQUIRER (Oct. 23, 1998), http://enquirer.com/editions/1998/10/23/loc_acquit23.html.

²⁰⁶ See, e.g., *State v. Robbins*, 388 N.E.2d 755, 755 (Ohio 1979).

from such danger was by use of deadly force; and (D) that he did not violate a duty to retreat.²⁰⁷

In June 2002, I defended Darrell Coad, a young black man charged with the murder of Michael James.²⁰⁸ James initiated and beat Coad in a fistfight because James believed that his car had been broken into by Coad while he was in jail.²⁰⁹ Shortly after the beating, Coad purchased a gun for protection.²¹⁰ As Coad was attempting to leave the neighborhood, he again encountered James.²¹¹ Convinced that James would kill him, Coad shot at the unarmed James three times, fatally striking him in the back with two of the bullets.²¹² My defense of Coad was simple: when he unexpectedly crossed paths with James, he did not have time to retreat; he reasonably feared that the faster James would catch him and kill him if he did not kill James first. The judge properly instructed the jury on the duty to retreat in Ohio, yet Coad was acquitted of murdering the unarmed James.²¹³

The judge in the Zimmerman trial instructed the jury as follows: “[y]ou must judge him by the circumstances by which he was surrounded *at the time* the force was used.”²¹⁴ Zimmerman’s defense, in part, was that he had no idea that he would have to use deadly force until Trayvon Martin was already on top of him, slamming his head into the concrete sidewalk.²¹⁵ Zimmerman successfully argued that, at the time he decided he had to use deadly force, it was impossible for him to retreat safely,²¹⁶ so it did not

²⁰⁷ *Id.*

²⁰⁸ See Coad, *supra* note 205.

²⁰⁹ Dan Horn, *Jury Agrees Shooting Was Self-Defense*, THE CINCINNATI ENQUIRER (June 29, 2002), http://enquirer.com/editions/2002/06/29/loc_jury_agrees_shooting.html.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Jury Instructions at 12, *State v. Zimmerman* (Fla. Cir. Ct.) (No. 2012 CF 1083 AXXX), http://www.flcourts18.org/PDF/Press_Releases/Zimmerman_Final_Jury_Instructions.pdf (emphasis added).

²¹⁵ While I do not personally agree with this defense, it is what Zimmerman’s attorneys argued at trial. See Lizette Alvarez, *In Zimmerman Case, Self-Defense Was Hard to Topple*, N.Y. TIMES (July 14, 2013), <http://www.nytimes.com/2013/07/15/us/in-zimmerman-case-self-defense-was-hard-to-topple.html?pagewanted=all&r=0> (reporting that Zimmerman shot Mr. Martin only after the teenager knocked him to the ground, punched him, straddled him and slammed his head into the concrete—“a weapon,” according to his attorney).

²¹⁶ The Zimmerman verdict may have been different if Florida and states with similar self-defense laws had the added element that Ohio law requires in deadly force and self-defense cases. For a defendant who has used deadly force to successfully argue self-defense in Ohio, that defendant must prove he “was not at fault in creating the situation giving rise to the event.” *Robbins*, 388 N.E.2d at 755. In other words, to successfully argue self-defense, a person cannot start a fight or create a situation that gives rise to an altercation that ends in death. A similar requirement in Florida law would have allowed the prosecution to argue

matter that there was a Stand Your Ground law in Florida. Again, this illustrates why proposed changes to self-defense laws are unlikely to prevent acquittals in cases where citizens and police shoot unarmed Black males.

Zimmerman did not testify,²¹⁷ but at trial he put an expert on the stand to testify about the concept of self-defense and the use of deadly force.²¹⁸ Defense expert Root said, “Zimmerman did the best he could, when he chose to kill Trayvon.”²¹⁹ Root reasoned, “Zimmerman wasn’t an athlete and lacked capabilities, ability and training in self-defense.”²²⁰ Root further claimed that Zimmerman lacked a “warrior mentality,”²²¹ perhaps implying that the seventeen-year-old Martin had a “warrior” mentality, and that Zimmerman was a victim. Unable to speak for himself, the defense portrayed the deceased teenager as a man who had possessed extraordinary strength and was “physically active,”²²² while the grown, fully armed adult who had stalked him through the neighborhood, had been at a disadvantage and needed to resort to deadly force to avoid becoming a victim of the Skittles-toting teenager.

Implicit fear of Black males plays a large role not only in how they become suspects but also how they are viewed by those in the criminal justice system on issues of innocence or guilt and credibility.²²³ The

that Zimmerman, after being warned by the 911 dispatcher not to follow Martin, created the situation that gave rise to his using deadly force. Secondly, it would have allowed the prosecution to demonstrate that it was Zimmerman’s explicit racial bias that allowed him to perceive the innocent actions of Trayvon as suspicious and criminal, which is what motivated his actions to stalk the teenager.

²¹⁷ Michael Pearson & Greg Botelho, *Zimmerman Opts Not to Testify as His Defense Team Rests Case*, CNN (July 11, 2013 1:38 AM), <http://www.cnn.com/2013/07/10/justice/zimmerman-trial/>.

²¹⁸ See Andrea Torres, *George Zimmerman Trial: Defense Expert Witness Dennis Root*, LOCAL 10.COM, <http://www.local10.com/news/george-zimmerman-trial-defense-expert-witness-dennis-root/20921516> (last updated July 10, 2013, 8:00 PM). How Root was ever allowed to testify as an expert witness on deadly force and on what Zimmerman was probably thinking that night goes beyond the parameters of this paper but is a subject that deserves further inquiry from a Rules of Evidence perspective.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² Ashleigh Barfield, *Prosecutor Uses Dummy in Zimmerman Case; Zimmerman Case Continues*, CNN (July 10, 2013 11:30 AM), <http://transcripts.cnn.com/TRANSCRIPTS/130710/cnr.06.html> (providing the transcript of Dennis Root’s testimony).

²²³ A study found that participants estimated Black boys to be older and less innocent than White boys of the same age. When participants were told that the boys, both Black and White, were suspected of crimes, the disparity in perceptions of age and innocence became more stark. Phillip Goff, *Black Boys Viewed as Older, Less Innocent Than Whites, Research Finds*, AM. PSYCHOL. ASS’N (Mar. 6, 2014), <http://www.apa.org/>

authors of the book *Pursuing Trayvon Martin*, posed the following question: "In U.S. society, as it is actually configured, can we imagine an armed Black man pursuing a young White Boy, killing him because, allegedly, he felt threatened by the White Boy[?]"²²⁴

2. *The police shooting of Michael Brown*

We are outraged to see that separate and unequal codes of conduct, nightmares we hoped were relegated to our forefathers' generations, persist today. We are outraged because somehow, it is permissible in a legal proceeding in 2014 to describe an unarmed young black man as "a demon," reviving the same racialized stereotypes[.] This description stripped Michael Brown not only of his humanity, even in his death, but also of the justice due to him.²²⁵

– Yale Law School's Black Law Students Association

Until August 9, 2014, many Americans had never heard of the small, predominantly black town of Ferguson, Missouri. On that day, while walking in the middle of the street with a friend, Michael Brown, a Black teenager, was approached by Officer Wilson, a White policeman, driving in a marked police vehicle.²²⁶ A struggle ensued between Brown and Wilson while Wilson was still in the vehicle.²²⁷ After emerging from his vehicle,

news/press/releases/2014/03/black-boys-older.aspx. Separate research suggests that these kinds of racialized perceptions of innocence contribute to non-white juvenile offenders receiving harsher sentences than their white peers. Braden Goyette & Alissa Scheller, *15 Charts That Prove We're Far From Post-Racial*, THE HUFFINGTON POST, http://www.huffingtonpost.com/2014/07/02/civil-rights-act-anniversary-racism-charts_n_5521104.html (last updated July 2, 2014, 10:59 AM).

²²⁴ PURSUING TRAYVON MARTIN: HISTORICAL CONTEXTS AND CONTEMPORARY MANIFESTATIONS OF RACIAL DYNAMICS 141 (George Yancy & Janine Jones eds., 2013).

²²⁵ Ryan Grim, *Yale Black Law Students: Michael Brown Case "Made a Mockery of Our So-Called Post-Racial Society"*, THE HUFFINGTON POST, http://www.huffingtonpost.com/2014/12/01/yale-black-law-students_n_6250736.html (last updated Dec. 2, 2014, 2:59 PM) (quoting the Black Law Student Association at Yale Law School's statement denouncing the failure to indict Darren Wilson).

²²⁶ Terrence McCoy, *Darren Wilson Explains Why He Killed Michael Brown*, WASH. POST (Nov. 25, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/11/25/why-darren-wilson-said-he-killed-michael-brown/>.

²²⁷ Officer Wilson told the authorities that Mr. Brown had punched and scratched him repeatedly, leaving swelling on his face and cuts on his neck and that during the scuffle, Brown reached for the gun. Wilson's gun was fired twice inside the vehicle and Brown fled. Michael S. Schmidt et al., *Police Officer in Ferguson is Said to Recount a Struggle*, N.Y. TIMES (Oct. 17, 2014), http://www.nytimes.com/2014/10/18/us/ferguson-case-officer-is-said-to-cite-struggle.html?_r=0.

Wilson fired at Brown twelve times.²²⁸ Brown was killed after being shot by eight bullets from Wilson's gun.²²⁹

When Wilson testified in front of the grand jury the next month, he described his encounter with Michael Brown as follows: "[W]hen I grabbed him, the only way I can describe it is I felt like a five-year-old holding onto Hulk Hogan. [T]hat's just how big he felt and how small I felt just from grasping his arm."²³⁰ Wilson also told the grand jurors that "the only way" he could describe Brown's "intense aggressive face" was that he looked "like a demon."²³¹ Such descriptions feed into the stereotypical portrayal of the Black man as a brutish, animalistic character. When such "code" words trigger the implicit racial bias in jurors, it can become automatic to view the Black male as an animalistic brute with such great strength that deadly force was required in order to preserve the life of the officer.

3. *The police shooting of Levar Jones*

A police officer's dashboard camera captured another example of implicit racial bias in shoot/don't-shoot decision-making on September 4, 2014.²³² In broad daylight, South Carolina State Trooper Sean Groubert approached Levar Jones, a Black man, at a gas station for a seat belt violation.²³³ Jones had just stepped out of his vehicle and was standing next to the still-open door when Groubert pulled up, approached Mr. Jones, and asked to see his license.²³⁴ As Jones reached into his car to get his license, Groubert began yelling at Jones and immediately fired several shots, with one hitting Jones in the hip.²³⁵ After being shot, Jones can be heard on the

²²⁸ Ryan J. Reilly, *Ferguson Officer Darren Wilson Not Indicted in Michael Brown Shooting*, THE HUFFINGTON POST, http://www.huffingtonpost.com/2014/11/24/michael-brown-grand-jury_n_6159070.html (last updated Nov. 24 2014, 10:39 PM).

²²⁹ AJ Vicens & Jaeah Lee, *Here's the Pentagon Report of Michael Brown's Autopsy*, MOTHER JONES (Dec. 8, 2014, 7:36 PM), <http://www.motherjones.com/politics/2014/12/heres-dods-report-michael-browns-autopsy> (referencing the Department of Defense's Armed Forces Medical Examiner System autopsy performed at the request of the U.S. Department of Justice).

²³⁰ *Transcript: State of Missouri v. Darren Wilson Grand Jury Volume V*, at 212 (Sept. 16, 2014), <http://www.documentcloud.org/documents/1370494-grand-jury-volume-5.html>.

²³¹ *Id.* at 225.

²³² Live Leak, *SC State Trooper Shoots Unarmed Man – Officer Fired From Job*, YOUTUBE (Sept. 25, 2014), http://youtu.be/KeT_oSLtI-o.

²³³ Santaella & Dial, *supra* note 8.

²³⁴ *Id.*

²³⁵ *Id.*

video's soundtrack asking the trooper, "Why did you shoot me? . . . I just got my license: you said get my license."²³⁶

Soon after the shooting, and evidently not realizing that the camera in his vehicle had recorded the entire incident, Groubert came up with a "scary Black guy" story.²³⁷ Groubert told his supervisor, "I pulled him over for a seat belt violation. Before I could even get out of my car he jumped out, stared at me, and as I jumped out of my car and identified myself, as I approached him, he jumped head-first back into his car."²³⁸ Groubert added,

I started retracting back towards the rear of the vehicle telling him 'Look, get out of the car, let me see your hands.' He jumped out of the car. I saw something black in his hands. I ran to the other side of the car yelling at him, and he kept coming towards me. Apparently, it was his wallet.²³⁹

Even a cursory review of the video makes clear that Jones was not a threat and that Groubert lied to build a case of self-defense.²⁴⁰ Thanks to the video, Groubert was charged with aggravated assault and battery.²⁴¹ Without video of the incident, he probably would have escaped all charges based on his made-up story of a scary Black man.

4. *The police shooting of John Crawford III*

On August 5, 2014, John Crawford was shopping at Wal-Mart in Beavercreek, Ohio, close to the city of Dayton, Ohio.²⁴² Crawford, talking on his cell phone to the mother of his two children, picked up a toy rifle from the Wal-Mart shelf and carried it with him as he continued to shop.²⁴³ In the meantime, a customer called 911 and reported that a Black man was "walking around with a gun in the store," saying, "he's, like, pointing it at people."²⁴⁴ Officers were dispatched to the Wal-Mart and within seconds

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *S.C. Trooper Charged in Shooting of Unarmed Man*, ASSOCIATED PRESS (Sept. 25, 2014), available at www.cbsnews.com/news/sean-groubert-former-south-carolina-trooper-charged-in-shooting/.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² Hathaway, *supra* note 166.

²⁴³ Green, *supra* note 6.

²⁴⁴ Jon Swaine, *Doubts Cast on Witness's Account of Black Man Killed by Police in Walmart*, THE GUARDIAN (Sept. 7, 2014, 10:37 AM), <http://www.theguardian.com/world/2014/sep/07/ohio-black-man-killed-by-police-walmart-doubts-cast-witness-account>.

had pounced on Crawford and shot him twice.²⁴⁵ Crawford later died at a hospital.²⁴⁶

When comparing the video of these events to the officers' statements, several things are clear. At the time the officers come into contact with Crawford, the toy gun is pointed down and no one else is around.²⁴⁷ Although the officers' statements made it sound as though they gave Crawford ample warning to drop the gun and he refused to do so, the video revealed that they shot him within two seconds of spotting him in the store and that they did not give Crawford a chance to comply before killing him.²⁴⁸

Despite the video, however, a "special prosecutor"²⁴⁹ presented the case to a grand jury that refused to indict the officers. In announcing the grand jury's decision not to indict, the special prosecutor said, "The law says police officers are judged by what is in their mind at the time. You have to put yourself in their shoes at that time with the information they had."²⁵⁰ In other words, never mind the facts as long as the police claim to have perceived circumstances requiring deadly force, then the shooting is justified.

What makes this case even more troubling is that it is legal in Ohio to carry a rifle openly in public.²⁵¹ At least one expert noted that "officers have an obligation to reassess what they [have] been told, by a dispatcher or a citizen, once they [are] on the scene of what they have been told is a crime."²⁵² These officers should have realized something was not adding

²⁴⁵ *Id.*; see also Green County Dailies, *Wal-Mart Surveillance Video of John Crawford III Shooting* (Sept. 24, 2014), <http://youtu.be/S9FtNOV6Qhk> [hereinafter *Surveillance Video*].

²⁴⁶ Swaine, *supra* note 244.

²⁴⁷ *Surveillance Video*, *supra* note 245.

²⁴⁸ *Id.* Police said an officer to Crawford's left twice shouted "put it down." The official police statement said responding officers confronted the suspect inside the store and the subject was shot after failing to comply with verbal commands. Swaine, *supra* note 244.

²⁴⁹ Special prosecutor Mark Piepmeyer was not a prosecutor in the jurisdiction where the shooting occurred but he was assigned to the case by the Ohio Attorney General Mike DeWine. Kim Palmer, *Ohio Appoints Special Prosecutor for Fatal Police Shooting at Walmart*, REUTERS (Aug. 26, 2014, 2:00 PM), <http://www.reuters.com/article/2014/08/26/us-usa-ohio-shooting-police-idUSKBN0GQ1U420140826>.

²⁵⁰ Sheila McLaughlin, *Family of Man Shot at Wal-Mart "Disgusted,"* CINCINNATI.COM (Sept. 25, 2014, 7:24 PM), <http://www.cincinnati.com/story/news/courts/2014/09/21/grand-jury-convenes-beavercreek-walmart-police-involved-shooting-john-crawford-iii/16030327/>.

²⁵¹ Ohio only has one law making it illegal to carry a weapon concealed and without a permit. See OHIO REV. CODE § 2923.11-12 (2013). Yet John Crawford was shot dead for holding a pellet gun that had been sitting on the shelf for shoppers to buy. McLaughlin, *supra* note 250.

²⁵² Thomas Gnau, *Officer: "I Fired Two Shots Center-Mass at (John Crawford III)"*,

up when, upon arriving at the store, they did not observe or hear any gunfire, nor did they observe any shoppers or bystanders screaming, running out of the store, or otherwise expressing concern about Crawford.²⁵³ There is no record of what these officers discussed on their way to Wal-Mart after hearing that a Black man was seen in the store pointing a gun at people, but what one of them told investigators after the shooting may provide a hint: "I knew one thing, and that was there was no way we could allow him to get out."²⁵⁴

5. *The police shooting of Tamir Rice*

On November 22, 2014, a twelve-year-old Black boy was playing with a toy gun in a city park in Cleveland, Ohio.²⁵⁵ Someone called 911 and reported that there was a guy in the park pointing a gun at people, but told the dispatcher twice that the gun was "probably a fake" and the suspect was "probably a juvenile."²⁵⁶ Two Cleveland police officers responded, and one of them jumped out of the squad car and shot the boy twice within approximately 1.5 seconds of their arrival.²⁵⁷ Tamir Rice died the next day.²⁵⁸

On the day of the shooting, Cleveland police representatives told the press the officers' account of what led to the shooting:

A rookie officer and a 10-15 year veteran pulled into the parking lot and saw a few people sitting underneath a pavilion next to the center. The rookie officer saw a black gun sitting on the table, and he saw the boy pick up the gun and put it in his waistband . . . The officer got out of the car and told the boy to put his hands up. The boy reached into his waistband, pulled out the gun and the rookie officer fired two shots.²⁵⁹

At the time this article is being written, the investigation into the shooting of Tamir Rice is still pending. Already it is clear, however, that

DAYTON DAILY NEWS, <http://www.daytondailynews.com/news/news/local/officers-describe-moments-before-john-crawford-sho/nhhft/> (last updated Oct. 13, 2014, 1:02 PM).

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ David Knowles, *Police Shot Tamir Rice Immediately, Despite Warning Gun Was 'Probably Fake'*, BLOOMBERG (Nov. 26, 2014, 11:35 AM), <http://www.bloomberg.com/politics/articles/2014-11-26/cleveland-police-shot-tamir-rice-immediately-despite-warning-gun-was-probably-fake>.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ McCarthy, *supra* note 7.

²⁵⁹ Cory Shaffer, *Cleveland Police Officer Shoots 12-Year-Old Boy Carrying BB Gun*, CLEVELAND.COM, http://www.cleveland.com/metro/index.ssf/2014/11/cleveland_police_officer_shoot_6.html (last updated Nov. 23, 2014, 1:57 PM).

the officers' initial story does not match up with a video of the shooting. Similar to the officers involved in the shootings of Levar Jones and John Crawford, the officers involved in Tamir's shooting evidently were not aware that there was a video of the shooting when they told their horror story of a scary Black male who would not obey their commands after being told three times to put his hands up, and who appeared to be drawing a gun.²⁶⁰ The surveillance video shows that Rice was not seated at a table with another person as the police reported; he was by himself.²⁶¹ The video also showed that the officer shot Tamir less than two seconds after pulling up in the squad car, making it virtually impossible for him to have told Tamir to put his hands up three times.²⁶² Furthermore, the video makes clear that Tamir did not pull the air gun out of his waistband or brandish it, as reported by the officers.²⁶³

Within two days of shooting Tamir, but before the video had been made public, the media started running stories about Tamir's father, who had a criminal history of domestic violence.²⁶⁴ Perhaps the intended message was that Tamir might still be alive if he had better parents.²⁶⁵ In any event, it undoubtedly made it easier to believe the officers' incorrect description of Tamir's actions at the time of the shooting.

According to the police version of Tamir's shooting, a menacing Black man ignored three commands to put his hands up and was about to draw his

²⁶⁰ *Id.*

²⁶¹ McCarthy, *supra* note 7.

²⁶² *Id.*

²⁶³ *Id.* Two other significant issues surround the shooting as well. First, officers waited four minutes to deliver first aid to Tamir after shooting him. See Brandon Blackwell, *Cleveland Police Officers Waited Minutes To Give First Aid to Tamir Rice*, CLEVELAND.COM (Nov. 26, 2014, 3:50 PM), http://www.cleveland.com/metro/index.ssf/2014/11/cleveland_police_officers_wait.html. Secondly, Officer Loehmann was previously employed by another police department that was prepared to release him but allowed him to resign first. An Independence police official had "questioned Loehmann's ability to handle the duties of a police officer after an emotional breakdown during firearms training and other incidents that caused concern for his superiors." Questions remain as to why the Cleveland Police Department never looked at Loehmann's Independence personnel file and his fitness for duty. Adam Ferrise, *Cleveland Police Never Reviewed Independence Personnel File Before Hiring Officer Who Shot Tamir Rice*, CLEVELAND.COM, http://www.cleveland.com/metro/index.ssf/2014/12/cleveland_police_never_reviewe.html (last updated Dec. 4, 2014, 12:28 PM).

²⁶⁴ Brandon Blackwell, *Tamir Rice's Father Has History of Domestic Violence*, CLEVELAND.COM, http://www.cleveland.com/metro/index.ssf/2014/11/tamir_rices_father_has_history.html (last updated Nov. 28, 2014, 11:05 PM).

²⁶⁵ See *id.* (stating that an update to the article was added to give insight into the motivation to investigate his parent's background and that people from across the region have been asking whether Rice grew up around violence).

weapon, presumably to kill the police officers.²⁶⁶ Had it not been for the videotape, many in the community may have felt sorry for Tamir but believed that the officer had no choice but to shoot.

V. CONCLUSION

Each shooter in the above-described shootings of unarmed Black males made a split-second decision that was influenced by implicit racial bias. Fear was magnified to some degree because the victims were Black. They probably looked older than they actually were, bigger and stronger than they actually were, and more menacing than they actually were. The legal system perpetuates this bias when judges and juries agree that the shooter's impressions and fears were reasonable under the circumstances.

Implicit bias has little to do with a person's explicit values and beliefs. Because implicit bias is subconscious, it can produce actions that are totally inconsistent with explicit attitudes—and take a great deal of effort and time to overcome.²⁶⁷ If implicit racial bias in police shootings is to be minimized, there must be increased focus on police training, jury education, and collaboration between police departments and their Black communities.

Police officers must learn that implicit racial bias has little to do with explicit racial bias. That is, they can be good people with the very best of explicit intentions and still be strongly influenced—especially in stressful situations—by implicit racial bias. Additionally, police should undergo significantly more shoot/don't-shoot training. Research shows that such training can reduce implicit shooter bias.²⁶⁸

The justice system must also be better equipped to provide a fair, unbiased outcome in each police shooting case. To better accomplish this, judges could allow attorneys to *voir dire* potential jurors on implicit racial bias. As evidenced by jurors' comments following their verdict in the Rodney King case,²⁶⁹ such training could mean the difference between an acquittal and a conviction. Perhaps judges should even allow jurors to take the IAT when undergoing orientation, so jurors are more aware of their

²⁶⁶ See Shaffer, *supra* note 259; see also McCarthy, *supra* note 7.

²⁶⁷ See Wilson et al., *supra* note 67, at 121.

²⁶⁸ E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Suspects*, 16 PSYCHOL. SCI. 180, 183 (2005). Law enforcement officers in this study participated in a shooter simulation similar to the one used by Correll. Although they mistakenly shot unarmed Black suspects more than unarmed White suspects at first, the racial bias was completely eliminated after extensive practice with the program. One explanation for such an outcome may be that by bringing attention to the implicit bias, the officers place greater focus on their explicit, unbiased attitudes, thus overcoming the subconscious bias.

²⁶⁹ Sipchen, *supra* note 191.

implicit biases. Judge Mark Bennett authored an excellent article concerning this issue.²⁷⁰

Officers' productive interactions with Blacks outside of the work environment can also play a significant role in overcoming implicit racial bias.²⁷¹ This is especially significant as it relates to police officers whose exposure to Blacks is currently limited primarily to negative encounters they experience while on the job.²⁷² It is both problematic and dangerous for an officer's experience with Blacks to be limited to inherently stressful, perhaps even hostile situations, as these officers may be conditioned to have negative expectations of all Black males.²⁷³

In an effort to combat negative assumptions about all Black suspects, it has been suggested that police departments make an effort to increase their involvement in uplifting community events,²⁷⁴ such as neighborhood block parties or community forums. This would allow for greater opportunities for police to enjoy positive experiences with Blacks in their neighborhoods. Such involvement might gradually combat racial bias. It is crucially important that police officers and community members are comfortable interacting with each other, and that they see each other's humanity.

Law enforcement and Black communities must learn how to "see each other." This cannot come simply from reading books or watching TV shows like "Law and Order,"²⁷⁵ or even compelling productions such as "Roots,"²⁷⁶ but by developing meaningful relationships in the communities in which they live and work. Everyone benefits when police take the time and make the effort to "see" the people they have vowed to protect and serve, and Black communities make the time and the effort to "see," and to appreciate the service and protection provided by the police.

²⁷⁰ See Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010). Bennett asserts that everyone involved in the criminal justice legal system should be educated on implicit racial bias and required to take the IAT to better understand the issue of how race automatically plays a critical role in many cases and jury decisions. He has even created PowerPoint slides that he allows attorneys to use in helping to educate potential jurors about implicit racial bias and "shooter bias" studies.

²⁷¹ Michelle Peruche & E. Ashby Plant, *The Correlates of Law Enforcement Officers' Automatic and Controlled Race-Based Responses to Criminal Suspects*, 28 BASIC & APPLIED SOC. PSYCHOL. 197 (2006).

²⁷² *Id.*

²⁷³ *Id.* at 197-198.

²⁷⁴ *Id.* at 198.

²⁷⁵ LAW & ORDER (NBC, 1990-2010).

²⁷⁶ ROOTS (ABC, 1977).

The changes implemented in Cincinnati under the Collaborative Agreement provide a good model for lasting reform in any city.²⁷⁷ Two of the most important goals of the Collaborative were police officers and community members becoming proactive partners in problem solving, and greatly improved relationships of respect, cooperation, and trust within and between police and their communities.²⁷⁸

After the 2001 riots in Cincinnati, as part of the Collaborative process, stakeholders from the community were surveyed, including the police and their spouses. Uniformly, the citizens of Cincinnati expressed their desire to see the parties design police and community programs that would “promote positive interaction between the police and the public,”²⁷⁹ such as Community Problem-Oriented Policing (“CPOP”).

The Collaborative reforms were implemented in Cincinnati slightly more than 10 years ago.²⁸⁰ After the much more recent riots and protests of 2014, the media revisited the Collaborative and the City of Cincinnati to see if that process and agreement had produced any lasting results.²⁸¹ In describing how Cincinnati police changed after the Collaborative, Former Cincinnati Police Chief Tom Streicher said,

There's no one single thing you can point to. There's an improved approach to how we conduct business and it starts with training. We've continued to ask ourselves: Even if an action is right, is there a better way to do business?²⁸²

The Cincinnati police department now boasts fewer police shootings and greater cultural competency.²⁸³ Officers are now trained in low-light situations, like the alley where Timothy Thomas died.²⁸⁴ There also have been changes to the department's foot-pursuit policy, and officers now carry, and receive training in the use of tasers as an alternative to guns.²⁸⁵

²⁷⁷ See Jane Prendergast, *2001 Riots Led to Top-Down Change for Cincinnati Police*, THE CINCINNATI ENQUIRER (Apr. 3, 2011, 2:02 PM), http://usatoday30.usatoday.com/news/nation/2011-04-03-cincinnati-riots-anniversary_N.htm.

²⁷⁸ While the goals, process, and implementation of the Collaborative are too extensive to discuss in this article, I mention them briefly to show that the solutions have worked in Cincinnati and can be used as a model for the law enforcement and communities throughout the entire nation. See *In Re Cincinnati Policing*, *supra* note 52.

²⁷⁹ *Id.*

²⁸⁰ Prendergast, *supra* note 44.

²⁸¹ They Killed 15 Black Men, *supra* note 57.

²⁸² Prendergast, *supra* note 44.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

The Citizens Complaint Authority reviews all use-of-force cases, and complaints against officers have decreased.²⁸⁶

These positive outcomes from a deliberate and expansive collaboration process and agreement provide hope for the rest of the nation. The way to learn how to see one other is to spend time with one another, and march towards a common goal: safe communities with bias-free policing.²⁸⁷

²⁸⁶ *Id.*

²⁸⁷ I owe a great debt of gratitude to University of Hawai'i William S. Richardson School of Law Dean Avi Soifer and the entire Richardson 'ohana for giving this disbarred lawyer another opportunity to use my training and experience to serve others. I also am indebted to the Hawai'i and Ohio Lawyers Assistance Programs for assistance in my recovery and allowing me to assist other recovering addicts and alcoholics. A special thanks goes to Professors Hazel Beh and Randall Roth, colleagues who commented extensively on early drafts of this article, and to law student Sharon Paris Cacurak, who along with my daughter Kirby Lynn Lawson, provided excellent research and editing assistance. Finally, I want to thank the University of Hawai'i Law Review for encouraging this old trial lawyer to organize his thoughts and experiences on such an important topic, and for their superb assistance. As detailed in this article, I now believe that police shootings of unarmed Black males generally occur because of implicit racism that is deeply imbedded in almost all of us. Hopefully, by better understanding the science of implicit bias, we can all "get along" on a much higher level and develop better and more effective police-community relations.